

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY OF INDUSTRIAL ENERGY USERS-OHIO**

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Despite the fact that OP has repeatedly stated it is not within the Commission's jurisdiction to set a rate for wholesale capacity purchased by competitive retail electric service ("CRES") providers, the Ohio Power Company ("OP") has offered testimony to the Public Utilities Commission of Ohio ("Commission") in this proceeding seeking to establish a wholesale capacity rate. On April 10, 2012, Industrial Energy Users-Ohio ("IEU-Ohio") filed a Motion to Dismiss that argued that the Commission lacked the statutory authority under state law to set the wholesale rate for generation capacity service provided to CRES providers.<sup>1</sup> Rather than joining the Motion to Dismiss filed by IEU-Ohio, OP filed a Memorandum in Partial Opposition presenting several "arguments" which do not address the merits of IEU-Ohio's motion.<sup>2</sup> Because none of OP's claims justifies continued Commission involvement in setting the capacity prices charged to CRES providers, the Commission should grant the Motion to Dismiss.

Initially, OP argues that IEU-Ohio has taken an inconsistent position with regard to the Commission's authority to issue additional orders if the Commission dismisses this action. As OP explains, "IEU concludes its motion to dismiss by requesting that the Commission ... issue an order directing AEP Ohio to return to RPM pricing for capacity

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<sup>1</sup> Motion to Dismiss of Industrial Energy Users-Ohio (Apr. 10, 2012) ("Motion to Dismiss").

<sup>2</sup> Ohio Power Company's Memorandum in Partial Opposition to Motion to Dismiss of Industrial Energy Users-Ohio (Apr. 13, 2012) ("OP Memo Contra").

upon determining that it has no jurisdiction.”<sup>3</sup> This statement of IEU-Ohio’s position is not accurate. If the Commission grants the motion, it will revoke the orders it has previously issued that improperly granted OP the authority to bill CRES providers at prices other than that set by the Reliability Assurance Agreement (“RAA”). As explained in the Motion to Dismiss, “As a result, the Commission must direct OP to immediately cease billing and collecting any price for capacity sold to a CRES supplier for resale to shopping customers in OP’s service area except the capacity price established in accordance with PJM’s capacity rates and should return to the levels set by the RPM pricing mechanism.”<sup>4</sup> The only thing “bizarre”<sup>5</sup> about this statement is OP’s suggestion that IEU-Ohio is arguing anything different than what is the legal effect of a motion to dismiss.

OP next urges that IEU-Ohio is not presenting a threshold issue of jurisdiction by pointing out that the Commission’s jurisdiction is limited to retail matters because the capacity service addressed in this case is a wholesale service.<sup>6</sup> This argument again fails to address the relevant point. The scope of the Commission’s jurisdiction over rates is central to the determination of what can and cannot be decided in this matter. As explained in the Motion to Dismiss, the Commission is a creature of statute and may set rates for retail services for only those services as provided by statute. Section 4928.03, Revised Code, provides that retail electric generation is competitive.<sup>7</sup> Section 4928.05(A)(1), Revised Code, precludes Commission regulation of competitive services

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<sup>3</sup> OP Memo Contra at 3.

<sup>4</sup> Motion to Dismiss at 10-11.

<sup>5</sup> OP Memo Contra at 3.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Section 4928.03, Revised Code.

except as provided by other provisions of Chapter 4928. The only provisions allowing the Commission to address rates are those related to the standard service offer, Sections 4928.141, 4928.142, and 4928.143, Revised Code. Wholesale capacity service, standing alone, fits within none of the areas covered by Ohio's ratemaking statutes.<sup>8</sup> If there is no service on which the Commission can act, then the Commission lacks the statutory authority to consider OP's request for authority to change the pricing method that has been in place since 2007 so that OP can implement one of several alternative proposed pricing schemes selectively and for OP's strategic advantage. OP does not suggest otherwise.

Additionally, OP suggests that IEU-Ohio has taken an inconsistent position regarding the jurisdiction of the Commission, pointing to several pleadings OP incorrectly insists suggest IEU-Ohio is engaging in "gamesmanship."<sup>9</sup> First, OP points to a January 14, 2011 Memorandum Contra filed in response to OP's Application for Rehearing in this case and cites a portion of IEU-Ohio's argument out of context.<sup>10</sup> OP's argument plainly ignores the position IEU-Ohio took in its Initial Comments that the Commission had acted to set a state compensation mechanism when it adopted several retail provisions in OP's first electric security plan ("ESP") that addressed capacity concerns.<sup>11</sup> It further failed to address the discussion contained in IEU-Ohio's Memorandum Contra, the very document OP relies upon to claim that IEU-Ohio is not

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<sup>8</sup> Motion to Dismiss at 6-10.

<sup>9</sup> OP Memo Contra at 5.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> Comments of Industrial Energy Users-Ohio at 5-9 (Jan. 7, 2011).

taking consistent positions, indicating that the Commission in the December 8, 2010 Entry acted within the Commission's jurisdiction:

Based on the facts and applicable law, the Commission's determination (in the December 8 Entry) that it "...approved retail rates for the Companies, including recovery of capacity costs through provider of last resort charges to certain retail shopping customers..." has controlling significance based on the FERC-approved language in PJM's RAA. The Commission's December 8 Entry is not exercising jurisdiction over any subject that is within the exclusive jurisdiction of FERC. It has only made a determination that has significance and is controlling under the FERC-approved RAA on the question of how and when AEP-Ohio is free to propose a change in the basis for compensation.<sup>12</sup>

Second, OP identifies IEU-Ohio's opposition to the two-tiered capacity pricing scheme as some sort of concession that the Commission has authority under state law to authorize the formula-based price OP is seeking.<sup>13</sup> Once again, however, OP chooses to ignore that IEU-Ohio raised the same question of jurisdiction presented in this Motion to Dismiss in its argument in support of its Application for Rehearing to the Commission's December 14, 2011 Opinion and Order. As IEU-Ohio stated:

The Commission is a creature of statute; it has only that authority provided to it by the General Assembly. There is nothing in the Chapter 4928, Revised Code, that would support the Commission's Opinion and Order to set or increase generation capacity service charges. Generation service, moreover, is a competitive retail electric service by operation of law and, except as otherwise specified by Ohio law, the Commission has no jurisdiction over competitive retail electric service. The Opinion and Order does not identify the source of the Commission's authority to increase the capacity charge that applies to CRES suppliers for the purpose of erecting economic barriers to shopping or to increase such charge by an arbitrary amount. Irrespective of

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<sup>12</sup> Industrial Energy Users-Ohio's Memorandum Contra Application for Rehearing at 7 (Jan. 14, 2011).

<sup>13</sup> OP Memo Contra at 7.

what is contained within the Opinion and Order, there is no such authority. Accordingly, the arbitrary capacity charge increase is unlawful and unreasonable.<sup>14</sup>

OP further complains that IEU-Ohio has submitted hundreds of pages of testimony and briefs concerning the merits of OP's attempts to block shopping.<sup>15</sup> The fact that IEU-Ohio has been forced to respond to OP's various proposals to block shopping, however, is a function of OP's pursuit of a patently illegal and discriminatory capacity pricing schemes.

Finally, OP argues that IEU-Ohio should be estopped from challenging the Commission's jurisdiction because of prior conflicting positions. The premise of OP's argument, however, is incorrect: Since its initial filing in this matter, IEU-Ohio has consistently argued that the scope of the Commission's authority to OP's newly proposed method of establishing capacity prices is controlled by Ohio law. Thus, there is no merit to OP's argument that IEU-Ohio should be estopped from challenging the statutory authority of the Commission to proceed under state law.<sup>16</sup>

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<sup>14</sup> Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 26 (Jan. 13, 2012) (citation omitted).

<sup>15</sup> OP Memo Contra at 7.

<sup>16</sup> Apart from the lack of a factual basis for applying an estoppel, the purpose of estoppel also does not justify its use in this case:

The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. *Heckler v. Community Health Services* (1984), 467 U.S. 51, 59; *Lex Meyers Chevrolet Co. v. Buckeye Finance Co.* (1958), 107 **Ohio** App. 235, 237, 8 O.O. 2d 171, 173, 153 N.E.2d 454, 456, affirmed (1959), 169 **Ohio St.** 181, 8 O.O. 2d 154, 158 N.E.2d 360. The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading. *Heckler, supra*, at 59.

OP finds itself in the position of challenging the Commission's jurisdiction to set a capacity price while at the same time pursuing that very outcome from the Commission. In fact, this proceeding has become the cornerstone of OP's attempt to block customer choice when retail electric choice is finally developing in OP's service territory. The Commission, however, lacks the statutory authority to enable OP's unlawful proposal. As a result, the Commission should dismiss this action and thereby eliminate any further suggestion that OP can continue to bill and collect for capacity other than at prices resulting from the RPM pricing mechanism.

Beyond offending the rule of law, OP's double-barreled attack on customer choice uniquely in its retail service territory cannot be considered by the Commission because the attack is unjust and unreasonable and contrary to the public interest.

Since 2007, OP has used a market-based pricing method to set the price that CRES providers pay for use of a portion of OP's electric generating stations. This market-based pricing method is the same method approved for all utilities in Ohio. OP and its affiliates pay a market-based price when they use generators owned by other utilities to compete for the customers of these other utilities. For example, OP's affiliates are taking advantage of the market-based pricing method to successfully compete for customers in the service areas of Ohio Edison Company, The Toledo Edison Company, The Cleveland Electric Illuminating Company, Dayton Power & Light, and Duke Energy Ohio. Many electric consumers in these other utility areas have received offers from OP's affiliates which are promising to lower electric bills if they switch to the lower market prices for electricity.

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*Ohio State Board of Pharmacy v. Frantz*, 51 Ohio St. 3d. 143, 145 (1990). OP has not demonstrated in any way that it would be prejudiced by a decision that would dismiss this action, a result OP itself apparently endorses by its argument that the Commission is preempted by federal law.

Since 2007, the market-based price for the use of electric generating plants has dropped significantly. The downturn in the economy has reduced demand for electricity and natural gas prices have declined sharply as a result of the large amount of natural gas that is now being produced in Ohio and other parts of the Nation with energy-rich shale formations. As with the home market that has challenged many homeowners, things in the electricity market have changed since 2007.

Instead of adjusting to the consequences of markets and the market-based pricing that OP began using to its advantage in 2007 when OP pushed for market-based pricing, OP is now demanding that the Commission and the FERC change the method by which prices are set for the use of OP's generating plants. OP's demand to change the pricing method does not call for a uniform or symmetrical change that would apply to all utilities and all transactions. Instead, it is only calling for a change in the pricing method when a competitive supplier wants to use OP's generating plants to serve customers located in OP's service area. OP is asking the PUCO to allow OP to adopt a new pricing method which OP claims will permit it to charge a price many times higher than the otherwise applicable market price. OP complains that sticking with OP's market-based pricing approach will allow competitive suppliers to offer lower retail electric bills than OP is willing to accept.

If OP is successful, OP will build a wall around its retail customers to keep them captive to higher electric bills. Resolving a debate over such a wall, even if the debate is framed to focus on the height of this wall or who and how many should be allowed through the gate, is not within the Commission's authority in this proceeding. The request for any wall, regardless of height and who and how many OP will let pass through the gate, is, *per se*, an unjust and unreasonable request when measured by the

letter and spirit of Ohio law. Further, as IEU-Ohio has asserted and continues to maintain, any wall-building undertaken to “transition” OP to a competitive market violates: (1) Ohio law regarding the opportunity to submit a claim for transition revenue; and (2) OP’s Commission-approved commitment to not impose lost revenue charges on shopping customers.<sup>17</sup>

IEU-Ohio urges the Commission to direct OP to immediately cease billing and collecting any price for capacity sold to a CRES supplier for resale to shopping customers in OP’s service area except the capacity price established in accordance with PJM’s RPM pricing mechanism.<sup>18</sup>

Respectfully submitted,

/s/ Frank P. Darr  
Samuel C. Randazzo, Esq.  
Frank P. Darr  
Joseph E. Olikier  
MCNEES WALLACE & NURICK LLC  
21 East State Street, Suite 1700  
Columbus, OH 43215-4228  
Telephone: 614-469-8000  
Telecopier: 614-469-4653  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

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<sup>17</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Transition Plan and Application for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Stipulation and Recommendation, Section IV (May 8, 2000); *Id.*, Entry on Rehearing at 4 (November 21, 2000).

<sup>18</sup> Motion to Dismiss at 10-11 (Apr. 9, 2012).



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio* was served upon the following parties of record this 16<sup>th</sup> day of April 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Frank P. Darr

Frank P. Darr

Steven T. Nourse  
Matthew J. Satterwhite  
Yazen Alami  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)  
[yalami@aep.com](mailto:yalami@aep.com)

Daniel R. Conway  
Christen M. Moore  
Porter Wright Morris & Arthur  
Huntington Center  
41 S. High Street  
Columbus, OH 43215  
[dconway@porterwright.com](mailto:dconway@porterwright.com)  
[cmoore@porterwright.com](mailto:cmoore@porterwright.com)

### **COUNSEL FOR COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY**

David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
BOEHM, KURTZ & LOWRY  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)

### **COUNSEL FOR THE OHIO ENERGY GROUP**

Kyle L. Kern, Counsel of Record  
Melissa R. Yost  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)  
[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

### **COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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

### **COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION**

Richard L. Sites  
General Counsel & Senior Director of Health  
Policy  
Ohio Hospital Association  
155 E. 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  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

**COUNSEL FOR OHIO HOSPITAL ASSOCIATION**

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

**COUNSEL FOR DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC AND CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC., RETAIL ENERGY SUPPLY ASSOCIATION**

Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)

John N. Estes III  
Paul F. Wight  
Skadden, Arps, Slate, Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005  
[john.estes@skadden.com](mailto:john.estes@skadden.com)  
[paul.wight@skadden.com](mailto:paul.wight@skadden.com)

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

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

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

**COUNSEL FOR FIRSTENERGY SOLUTIONS CORP.**

Dorothy Kim Corbett  
Associate General Counsel  
Duke Energy Business Services LLC  
139 East Fourth Street  
Cincinnati, OH 45202  
[Dorothy.Corbett@duke-energy.com](mailto:Dorothy.Corbett@duke-energy.com)

Jeanne W. Kingery  
Associated General Counsel  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, OH 43215  
[Jeanne.Kingery@duke-energy.com](mailto:Jeanne.Kingery@duke-energy.com)

**COUNSEL FOR DUKE ENERGY RETAIL SERVICES, LLC**

David M. Stahl  
Eimer Stahl LLP  
224 S. Michigan Avenue, Suite 1100  
Chicago, IL 60604  
[dstahl@eimerstahl.com](mailto:dstahl@eimerstahl.com)

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

**COUNSEL FOR EXELON GENERATION COMPANY, LLC**

Mark A. Whitt  
Melissa L. Thompson  
Whitt Sturtevant LLP  
PNC Plaza, Suite 2020  
155 East Broad Street  
Columbus, OH 43215  
whit@whitt-sturtevant.com  
thompson@whitt-sturtevant.com

Vincent Parisi  
Matthew White  
Interstate Gas Supply, Inc.  
6100 Emerald Parkway  
Dublin, OH 43016  
vparisi@igsenergy.com  
[mwhite@igsenergy.com](mailto:mwhite@igsenergy.com)

**ON BEHALF OF INTERSTATE GAS SUPPLY,  
INC.**

Dane Stinson  
BAILEY CAVALIERI LLC  
10 West Broad Street, Suite 2100  
Columbus, OH 43215  
dane.stinson@baileycavalieri.com

**ON BEHALF OF THE OHIO ASSOCIATION OF  
SCHOOL BUSINESS OFFICIALS, THE OHIO  
SCHOOL BOARDS ASSOCIATION, THE OHIO  
SCHOOLS COUNCIL AND THE BUCKEYE  
ASSOCIATION OF SCHOOL ADMINISTRATORS**

Chad A. Endsley  
Chief Legal Counsel  
OHIO FARM BUREAU FEDERATION  
280 North High Street, P.O. Box 182383  
Columbus, OH 43218-2383  
cendsley@ofbf.org

**ON BEHALF OF THE OHIO FARM BUREAU  
FEDERATION**

Mark S. Yurick  
Zachary D. Kravitz  
TAFT STETTINIUS & HOLLISTER LLP  
65 East State Street, Suite 1000  
Columbus, OH 43215  
myurick@taftlaw.com  
zkravitz@taftlaw.com

**ON BEHALF OF THE KROGER CO.**

Jeanne W. Kingery  
Associate General Counsel  
Amy B. Spiller  
Deputy General Counsel  
139 E. Fourth Street, 1303-Main  
P.O. Box 961  
Cincinnati, OH 45201-0960  
Jeanne.Kingery@duke-energy.com  
Amy.Spiller@duke-energy.com

**ON BEHALF OF DUKE ENERGY COMMERCIAL  
ASSET MANAGEMENT, INC.**

Barth E. Royer  
BELL & ROYER CO., LPA  
33 South Grant Avenue  
Columbus, OH 43215-3927  
BarthRoyer@aol.com

Gary A. Jeffries  
Assistant General Counsel  
DOMINION RESOURCES SERVICES, INC.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15212-5817  
Gary.A.Jeffries@dom.com

**ON BEHALF OF DOMINION RETAIL, INC.**

Roger P. Sugarman  
KEGLER, BROWN, HILL & RITTER  
65 East State Street, Suite 1800  
Columbus, OH 43215  
rsugarman@keglerbrown.com

**ON BEHALF OF THE NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS**

C. Todd Jones  
Stephen J. Smith  
Gregory H. Dunn  
Christopher L. Miller  
Asim Z. Haque  
ICE MILLER LLP  
250 West Street  
Columbus, OH 43215  
Gregory.dunn@icemiller.com  
christopher.miller@icemiller.com  
asim.haque@icemiller.com

**ON BEHALF OF THE ASSOCIATION OF  
INDEPENDENT COLLEGES AND UNIVERSITIES  
OF OHIO AND THE CITY OF GROVE CITY,  
OHIO**

Brian P. Barger  
Brady, Coyle & Schmidt, LTD.  
4052 Holland-Sylvania Road  
Toledo, OH 43623  
bpbarger@bcslawyers.com

**ON BEHALF OF THE OHIO CONSTRUCTION  
MATERIALS COALITION**

Emma Hand  
SNR Denton  
1301 K Street NW  
Suite 600, East Tower  
Washington, DC 20005-3364  
Emma.hand@snrdenton.com

**ON BEHALF OF ORMET PRIMARY ALUMINUM  
CORPORATION**

Michael R. Smalz  
Joseph V. Maskovyak  
Ohio Poverty Law Center  
555 Buttrick Avenue  
Columbus, OH 43215-1137  
msmalz@ohiopoveritylaw.org  
jmaskovyak@ohiopoveritylaw.org

**ON BEHALF OF THE OHIO POVERTY LAW  
CENTER**

David Rinebolt  
231 West Lima Street  
PO Box 1793  
Findlay, OH 45839-1793  
drinebolt@ohiopartners.org

**ON BEHALF OF OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

Steven Beeler  
Werner Margard  
John Jones  
Public Utilities Section  
Ohio Attorney General's Office  
180 East Broad Street, 6th Floor  
Columbus, OH 43215  
werner.margard@puc.state.oh.us  
steven.beeler@puc.state.oh.us  
john.jones@puc.state.oh.us

**ON BEHALF OF THE STAFF OF THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

Greta See  
Sarah Parrot  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street, 12<sup>th</sup> Floor  
Columbus, OH 43215  
[Greta.See@puc.state.oh.us](mailto:Greta.See@puc.state.oh.us)  
[Sarah.Parrot@puc.state.oh.us](mailto:Sarah.Parrot@puc.state.oh.us)

**ATTORNEY EXAMINERS**

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