

**BEFORE THE
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.)	

**FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR REHEARING OF THE
COMMISSION'S MAY 30, 2012 ENTRY**

Pursuant to R.C. § 4903.10 and O.A.C. 4901-1-35, Ohio Administrative Code, FirstEnergy Solutions Corp. ("FES") hereby applies for rehearing of the Entry issued in the above-captioned case on May 30, 2012 (the "May 30, 2012 Entry"). As demonstrated in the attached Memorandum in Support, the Entry is unreasonable and unlawful in that the Entry sets an unreasonable, unlawful and unsupported "two tier" state compensation mechanism for capacity charges to competitive retail electric service ("CRES") providers. Specifically, the Entry is unreasonable and unlawful because it:

- (1) fails to follow PJM policies regarding the Reliability Pricing Model, pursuant to which capacity pricing is not based on traditional cost-of-service ratemaking methodologies but is, instead, intended only to compensate RPM participants, including Fixed Resource Requirement ("FRR") entities, for reliability;
- (2) continues an improper "interim" state compensation mechanism which grants cost recovery for stranded investments and is based on non-market factors without providing any justification as to why the Commission is implementing this above-market capacity pricing mechanism;
- (3) imposes capacity pricing above Reliability Pricing Model ("RPM") prices on Tier One customers who have always been entitled to RPM-priced capacity;
- (4) is not based on probative or credible evidence that AEP Ohio will suffer immediate or irreparable financial harm under RPM market-based capacity prices; and
- (5) continues an "interim" state compensation mechanism which violates Ohio law, as demonstrated in FES' Application for Rehearing of the March 7, 2012 Entry.

The Commission's May 30, 2012 Entry denies customers the benefits of RPM-priced capacity indefinitely. The Commission should grant rehearing and modify its May 30, 2012 Entry to restore the RPM capacity pricing that customers and CRES providers have relied upon since 2007.

Respectfully submitted,

s/ Mark A. Hayden

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik (0006418)
Allison E. Haedt (0082243)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

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**MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S
APPLICATION FOR REHEARING**

I. INTRODUCTION

This case has been pending for eighteen months, with weeks of evidentiary hearings and thousands of pages of testimony and briefing. Perhaps as a result of this procedural history, several basic and indisputable facts relevant to this Application for Rehearing have been overlooked while the Commission deals with issues of the moment: (1) Reliability Pricing Model (“RPM”) market-based pricing is the only capacity pricing mechanism ever in place in Ohio for any utility since the inception of the market; (2) AEP Ohio’s formula rate seeks to apply traditional cost-of-service ratemaking principles in a competitive market for generation; and (3) the Commission is statutorily prohibited from authorizing cost-based recovery for generation assets or recovery of stranded costs.

Once these undisputed facts are taken into account, the flaws in the May 30, 2012 Entry are apparent. AEP Ohio’s formula rate seeks traditional cost-of-service recovery for its generation assets, including stranded costs. As a result of S.B. 3, the Commission is statutorily prohibited from using this formula rate as the state compensation mechanism for capacity pricing.¹ Maintaining the status quo created by AEP Ohio’s rejected Partial Stipulation is not a valid reason to impose dramatically above-market costs on Ohio customers in direct violation of

¹ R.C. § 4928.01(A)(28); R.C. § 4928.38 (“the utility shall be fully on its own in the competitive market.”); R.C. § 4928.39-.40; Lesser Direct, p. 10.

Ohio law. There is no reason to punish Ohio customers by continuing the improper “interim” pricing mechanism while the Commission considers AEP Ohio’s invalid proposal. The Commission should do exactly what it said it would do on March 7, 2012,² and immediately return to RPM-priced capacity until it issues its decision in this case.

II. ARGUMENT

A. Capacity Pricing Is Not Intended To Compensate AEP Ohio For The Cost Of Its Generation Assets.

AEP Ohio’s position in this case is simple. It demands “cost recovery” for the full embedded cost of its generation assets, and claims this recovery is appropriate because it is a Fixed Resource Requirement (“FRR”) entity. The Commission appears to have given credence to a portion of this position, finding that AEP Ohio’s POLR responsibility and Pool Agreement are somehow relevant to this case.³ Yet the Commission’s establishment of a state compensation mechanism must be consistent with the policy objectives of the RPM, given that the state compensation mechanism exists only to serve the purposes of the Reliability Assurance Agreement (“RAA”). The record in this case is clear and undisputed that the traditional cost-of-service methodology utilized by AEP Ohio and accepted by the Commission in its May 30, 2012 Entry directly conflicts with the RPM and the RAA.⁴ Moreover, a utility’s financial integrity is wholly irrelevant to the valuation of capacity for purposes of RPM and cannot be considered when setting the state compensation mechanism.

In competitive generation markets, energy prices are the mechanism through which the costs of generation resources typically are recovered. PJM’s capacity compensation mechanism

² March 7, 2012 Entry, ¶ 26.

³ March 7, 2012 Entry, ¶ 25; May 30, 2012 Entry, ¶ 30.

⁴ See FES Exh. 101, Direct Testimony of Robert B. Stoddard, pp. 6-28.

provide an additional layer of cost recovery for the purpose of ensuring reliability.⁵ It is not designed to ensure that AEP Ohio is made whole for the cost of all of its generating facilities.⁶ AEP Ohio is defining the full cost of all of its generating units as a capacity product, but that's not the PJM capacity product. Under the PJM capacity market design, generation owners recover their costs through energy prices, and the RPM and the RAA set the value of capacity to the extent required to ensure reliability, not to recover full embedded costs.⁷ The RPM design offers compensation to capacity suppliers, whether they are FRR Entities or RPM auction participants, at the level necessary to ensure reliability by providing value on top of what the energy market provides.

As explained by Mr. Stoddard, one of the drafters of the RAA, PJM's RPM market is "a market of willing sellers offering resources into a market set where the quantity is set to meet the reliability needs of the region."⁸ To the extent this requires reference to a capacity supplier's costs, only avoidable costs are relevant.⁹ Because the RPM process seeks to take advantage of the efficiencies – and lower prices – garnered through a competitive market,¹⁰ avoidable costs, not embedded costs, form the basis of the prices established in the RPM. This makes sense because avoidable costs are the costs that participants in a competitive market consider in setting

⁵ Tr. Vol. VIII, pp. 1600-03.

⁶ AEP Ohio consistently references and relies upon traditional cost-of-service concepts when promoting its FERC template, under which it provides cost-based energy and capacity to certain customers. Under this traditional approach, a customer purchases cost-based capacity and, in exchange for covering the utility's full embedded costs, is thereby entitled also to receive energy at cost. This is the opposite of the RPM design, under which generating resource owners are compensated for their costs through market-based energy prices and capacity is priced using market principles at the level necessary to ensure reliability.

⁷ Tr. Vol. VIII, pp. 1600-01.

⁸ Tr. Vol. VIII, p. 1603 (emphasis added).

⁹ FES Exh. 101, pp. 16-17, 28-40 (emphasis added).

¹⁰ Tr. Vol. V, pp. 855-59 and FES Exh. 118.

price offers.¹¹ Whether AEP Ohio has POLR responsibilities or is a member of the Pool Agreement required to share off-system sales is irrelevant to the PJM capacity market construct. When setting a state compensation mechanism for AEP Ohio, the Commission must ensure that the pricing mechanism is consistent with the purposes of the RAA and PJM market policies. These policies feature the development of a competitive market for capacity and retail generation service. The May 30, 2012 Entry conflicts with those purposes and policies by granting AEP Ohio a higher price for capacity than is justified to ensure reliability. Thus, the Commission should grant rehearing of the May 30, 2012 Entry.

B. The Commission Did Not Provide Sufficient Justification For Vacating The March 7, 2012 Order And Continuing “Interim” Pricing After May 31, 2012.

On March 7, 2012, the Commission improperly approved a continuation of the capacity pricing provisions of the Partial Stipulation. FirstEnergy Solutions Corp. (“FES”) filed an application for rehearing of the March 7, 2012 Entry, which is still pending. In the March 7, 2012 Entry, the Commission held that the two-tiered pricing would remain in effect “for the interim period only,” through May 31, 2012.¹² The Commission then directed that the capacity pricing mechanism, effective June 1, 2012, “shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year.”¹³

In the May 30, 2012 Entry, the Commission justified its extension of the “interim” capacity pricing mechanism by stating that various delays have prolonged this proceeding, making it impossible to issue a final decision by May 31, 2012.¹⁴ The Commission also pointed to the “range of capacity costs” in the record, and the risk of “an unjust or unreasonable result”

¹¹ FES Exh. 101, p. 12.

¹² March 7, 2012 Entry, ¶ 26.

¹³ March 7, 2012 Entry, ¶ 26.

¹⁴ May 30, 2012 Entry, ¶ 12.

to AEP Ohio it identified on March 7, 2012.¹⁵ The May 30, 2012 Entry is silent as to why the Commission specifically included a termination date for the interim capacity pricing mechanism in the March 7, 2012 Entry if it intended to continue this mechanism indefinitely while this case remained pending.

The justifications for extension identified by the Commission are insufficient. As discussed below, AEP Ohio has not met the statutory requirements for emergency rate relief, yet the Commission's decision reads as if AEP Ohio has done so.¹⁶ The Commission is statutorily prohibited from approving AEP Ohio's formula rate,¹⁷ yet the Commission gives weight to AEP Ohio's invalid proposal when discussing the range of capacity prices in this case. If the Commission is going to change course at the last moment and impose dramatically above-market prices on customers after May 31, 2012, it must provide a reasoned explanation why it is doing so. The May 30, 2012 Entry provided no such explanation but, instead, merely fell back upon cost-of-service concepts that have no application to rate setting under the RPM.

In addition, there is a significant difference between prejudging a case and imposing an interim pricing structure on Ohio customers. The Commission should not impose an interim capacity pricing mechanism on Ohio customers simply because AEP Ohio has taken an invalid litigation position. Similar to an application for a temporary restraining order in a civil case under Rule 65(A) of the Ohio Rules of Civil Procedure, before implementing an interim pricing mechanism the Commission should weigh the evidence and applicable law along with the

¹⁵ May 30, 2012 Entry, ¶ 12.

¹⁶ Under R.C. § 4909.16, AEP Ohio could have sought emergency relief. To obtain emergency relief AEP Ohio must prove that, without the requested emergency relief, the utility will be financially imperiled or its ability to render service will be impaired. The evidence must "clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation." *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001). AEP Ohio has not even attempted to meet this standard, either in connection with the March 7, 2012 Entry or the May 30, 2012 Entry.

¹⁷ Post-Hearing Brief of FirstEnergy Solutions Corp. filed Nov. 10, 2011, pp. 61-68.

potential harm to the non-moving party of granting interim relief.¹⁸ Staff and every intervening party have recommended that the Commission retain RPM pricing for capacity. In contrast, AEP Ohio seeks traditional cost-of-service recovery for generation assets, which is expressly prohibited by S.B. 3. By imposing this “interim” pricing mechanism, the Commission is severely curtailing shopping opportunities for AEP Ohio customers in violation of R.C. 4928.02(C) and providing a windfall to AEP Ohio. There is no record evidence, let alone a discussion in the Entry itself, justifying the Commission’s decision to take this significant step when authorizing “interim” relief of this type. Therefore, the May 30, 2012 Entry is improper.

C. There Is No Reason To Impose Non-RPM Prices On Tier One Customers.

RPM prices have been in effect for the entire relevant period. In connection with the now rejected Partial Stipulation, the Commission approved a departure from this pricing structure for certain customers that shop after September 7, 2011. The Commission later continued this pricing structure with certain revisions in its March 7, 2012 Entry. During this entire period, “Tier One” customers have been entitled to RPM-priced capacity. For the 2012/2013 Delivery Year, this means a delivered capacity price of \$20.01/MW-day.¹⁹

As pointed out in Commissioner Porter’s dissent, the May 30, 2012 Entry suddenly removed RPM pricing for Tier One customers with no explanation or justification whatsoever. AEP Ohio’s Motion for Extension presented no evidence justifying this departure from RPM pricing on Tier One customers. There is no evidence in the record justifying this decision.

It is improper for the Commission to impose \$146/MW-day pricing for Tier One customers when there is no record evidence justifying this decision. It is even more improper to impose this pricing without any discussion in the May 30, 2012 Entry explaining why the

¹⁸ *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

¹⁹ AEP Ex. 102, Direct Testimony of Kelly D. Pearce, KDP-7, p. 1 of 1.

Commission was modifying the Partial Stipulation's pricing provisions which were used to create the March 7, 2012 "interim" pricing structure. Tier One customers and CRES providers will be significantly prejudiced by this decision, and the Commission should reverse this decision on rehearing.

D. AEP Ohio's Purported Harm From RPM-Based Pricing Is Overstated And Unsupported.

The Commission's May 30, 2012 Entry continues the "interim" pricing mechanism in part due to the possibility of financial harm to AEP Ohio. However, there is simply no evidence supporting this aspect of the Commission's decision.

The Commission's "power to grant emergency relief is extraordinary in nature" and may only be granted after a utility sustains its burden of proving that, absent emergency relief, it will be financially imperiled or its ability to render service will be impaired.²⁰ A utility's evidence of financial impairment must "clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation."²¹ If an emergency is shown, the Commission is limited to granting temporary relief "only at the minimum level necessary to avert or relieve the emergency."²² The Commission in the past has directed the utility seeking emergency relief to provide expert testimony supporting its application and has conducted hearings on the application.²³

²⁰ *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

²¹ *Id.*

²² *Id.*

²³ *Id.*, p. 2.

AEP Ohio did not even attempt to satisfy these criteria, and instead simply represented to the Commission that it would like to receive more revenue.²⁴ A revenue estimate is not legally sufficient to justify the type of emergency relief that the Commission has granted to AEP Ohio during the pendency of this case. Evidence regarding grave financial peril to the utility is required. Moreover, AEP Ohio has offered no testimony establishing that two-tiered pricing is temporary relief “only at the minimum level necessary to avert or relieve the emergency.”²⁵

While interim pricing should not have been continued due to AEP Ohio’s evidentiary failures alone, a review of the facts shows that there is no way AEP Ohio could have met this burden. AEP Ohio paid a cash dividend to its one shareholder, AEP, of \$650,000,000 in 2011 while its net income for 2011 was substantially less than the dividend payout (\$464,992,339).²⁶ This dividend payout behavior is not consistent with the behavior that one would expect to see from a utility facing financial peril.

In the December 8, 2010 Entry, the Commission ordered AEP Ohio to continue to base its capacity pricing on RPM auction results as it had always done. AEP Ohio sought rehearing of the December 8, 2010 Entry, but it did not claim at that time that RPM market-based capacity pricing would cause it immediate and irreparable harm.²⁷ At the time, Columbus Southern Power Company’s return on equity (“ROE”) (as calculated for purposes of the Significantly Excessive Earnings Test or “SEET”) was approximately 18-20%, and Ohio Power Company’s ROE was approximately 10-11%, even without counting the hundreds of millions of dollars

²⁴ Motion, p. 4. AEP Ohio claimed that it would lose \$10 million/month in revenue if interim capacity pricing is not continued.

²⁵ *In re Akron Thermal, Ltd. Partnership*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001).

²⁶ See Tr. Vol. V, pp 1046-47.

²⁷ See Ohio Power Company’s and Columbus Southern Power Company’s Application for Rehearing filed Jan. 7, 2011.

received from off-system sales.²⁸ In fact, while charging RPM-based pricing for capacity, AEP Ohio was able to earn amounts that were so significantly excessive that the Commission ordered the company to refund amounts to customers.²⁹ More recently, AEP Ohio's witness Allen estimated that AEP Ohio's 2012 ROE would be approximately 7.6% (without off-system sales) if the state compensation mechanism priced capacity based on RPM from February through December, 2012.³⁰ This ROE estimate from February 27, 2011 is now outdated and underestimates AEP Ohio's ROE given that AEP Ohio has received above-market capacity pricing for more than half of 2012.³¹ As shown by these facts, AEP Ohio could not have met the burden required for emergency interim relief.

AEP Ohio did not present any valid evidence justifying its request for emergency relief, yet the Commission's May 30, 2012 Entry identifies the potential financial harm to AEP Ohio as a justification for its decision to continue the interim pricing provisions of the Partial Stipulation. As there is no record evidence justifying this decision, which appears to be contrary to both Ohio law and the facts, rehearing should be granted and RPM-based pricing should be restored.

E. The March 7, 2012 Entry Instituting Interim Capacity Pricing Is Improper, And Continuing This Improper Pricing Is Also Improper.

In the interests of efficiency, as FES' Application for Rehearing of the March 7, 2012 Entry has not yet been ruled upon by the Commission, the arguments contained in that Motion will not be repeated herein. Those arguments are hereby incorporated herein by reference. For

²⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at pp. 22, 35 (hereinafter, "2009 SEET Order"); *In the Matter of the 2010 Annual Filing of Columbus Southern Power Company and Ohio Power Company Required by Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 11-4571-EL-UNC et al., Direct Testimony of Joseph Hamrock filed July 29, 2011, at p. 6.

²⁹ 2009 SEET Order, p. 35.

³⁰ Exhibit WAA-1 to Direct Testimony of William A. Allen, AEP Exh. 104.

³¹ See March 7, 2012 Entry, ¶ 26.

the same reasons that it was inappropriate to adopt the interim pricing mechanism in the first place, it is inappropriate to continue that pricing mechanism.

III. CONCLUSION

For the reasons set forth above, FES respectfully requests that the Commission grant rehearing and issue an Entry consistent with this filing.

Respectfully submitted,

s/ Mark A. Hayden

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik (0006418)
Allison E. Haedt (0082243)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Application for Rehearing of the Commission's May 30, 2012 Entry* and the *Memorandum in Support* thereof were served this 15th day of June, 2012, via e-mail upon the parties below.

s/ N. Trevor Alexander

One of the Attorneys for FirstEnergy Solutions Corp.

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

Jeanne W. Kingery
Dorothy K. Corbett
Duke Energy Retail Sales
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
dorothy.corbett@duke-energy.com
jeanne.kingery@duke-energy.com

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

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

Cynthia Fonner Brady
David I. Fein
550 W. Washington Street, Suite 300
Chicago, IL 60661
cynthia.a.fonner@constellation.com
david.fein@constellation.com

Terry L. Etter
Maureen R. Grady
Jeffrey L. Small
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
small@occ.state.oh.us

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

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

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

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

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@grpowersgroup.com

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

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

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

Lisa G. McAlister
Matthew W. Warnock
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

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

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

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

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

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

M. Howard Petricoff
Stephen M. Howard
Michael J. Settineri
Lija Kaleps-Clark; Benita Kahn
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com
bakahn@vorys.com

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

Werner L. Margard III
John H. Jones
William Wright
Thomas Lindgren
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us
William.wright@puc.state.oh.us
Thomas.Lindgren@puc.state.oh.us

Philip B. Sineneng
Terrance A. Mebane
Carolyn S. Flahive
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
philip.sineneng@thompsonhine.com
carolyn.flahive@thompsonhine.com
terrance.mebane@thompsonhine.com

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

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

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

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

Emma F. Hand
Douglas G. Bonner
Keith C. Nusbaum
Clinton A. Vince
SNR Denton US LLP
1301 K Street, NW, Suite 600, East Tower
Washington, DC 20005-3364
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
keith.nusbaum@snrdenton.com
Clinton.vince@snrdenton.com

Colleen L. Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org

Trent A. Dougherty
Cathryn Loucas (0073533)
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
trent@theoeg.org
cathy@theoec.org

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Avenue, Suite 212
Columbus, Ohio 43212
callwein@williamsandmoser.com

David M. Stahl
Arin C. Aragona
Scott C. Solberg
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com
aaragona@eimerstahl.com
ssolberg@eimerstahl.com

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

Robert Korandovich
KOREnergy
P. O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

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Case No(s). 10-2929-EL-UNC

Summary: Application for Rehearing of May 30, 2012 Entry electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.