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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	))))))	Case No. 12-1230-EL-SSO

MEMORANDUM CONTRA OF NUCOR STEEL MARION, INC.
TO APPLICATIONS FOR REHEARING OF JULY 18 OPINION AND ORDER

Pursuant to Ohio Administrative Code 4901-1-35(B), Nucor Steel Marion, Inc. hereby submits this Memorandum Contra the applications for rehearing by the Office of the Ohio Consumers' Counsel and Citizen Power (collectively "OCC"), the Northeast Ohio Public Energy Council ("NOPEC"), and the Retail Energy Supply Association, Direct Energy Services, LLC, and Direct Energy Business, LLC (collectively "RESA").

I. INTRODUCTION

On July 18, 2012, the Commission issued an Opinion and Order ("July 18 Order") approving a stipulation entered into by FirstEnergy, Staff, and many other parties (including Nucor) establishing an electric security plan for the period June 1, 2013 through May 31, 2016 ("ESP III"). Applications for rehearing of the July 18 Order were filed on August 17, 2012. In this Memorandum Contra, Nucor addresses certain specific arguments raised by OCC, NOPEC, and

RESA in their applications for rehearing.[1] The Commission should reject these arguments and deny the applications for rehearing.

II. DISCUSSION

A. The Commission Properly Took Administrative Notice of the Portions of the Record in Case 10-388-EL-SSO

OCC and NOPEC assert that the Commission erred by taking administrative notice of limited portions of the record in the last FirstEnergy ESP case ("ESP II"), Case No. 10-388-EL-SSO (which included the full record from Case No. 09-906-EL-SSO). OCC and NOPEC present no new arguments for why the Commission should grant rehearing of its determination on this issue and, therefore, the Commission should deny rehearing.

Under Ohio law, the Commission has broad discretion to take administrative notice in proceedings. In *Allen v. Public Utility Commission*,[2] the Ohio Supreme Court held that there is neither an absolute right nor a prohibition against the Commission's authority to take administrative notice.[3] Instead, each case must be resolved based on the particular facts presented.[4] The court stated that "the factors we deem significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and

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[1] Nucor's failure to address other claimed errors in the applications for rehearing of OCC and NOPEC, or of any other party, should not be construed as agreement with such claims. In this memorandum contra we have just focused on the claims that go most directly to the issues related to Nucor. Nucor supports the Commission's decision to approve the ESP III stipulation, as modified, in the July 18 Order.

[2] 40 Ohio St.3d 184, 185, 532 N.E.2d 1307 (1988) ("*Allen*").

[3] *Id.*, 40 Ohio St.3d at 185, 532 N.E.2d at 1309.

[4] *Id.*

rebut, the facts administratively noticed. Moreover, prejudice must be shown before we will reverse an order of the commission."[5]

Based on the facts in this case, the Commission's decision to take administrative notice of limited portions of the record in Case No. 10-388-EL-SSO was more than justified. The ESP III Stipulation was, in large part, an extension of the existing ESP II plan which was approved by the Commission only two years ago. Therefore, it was reasonable for FirstEnergy and the parties joining the ESP III Stipulation to request that the record from Case No. 10-388-EL-SSO be incorporated into the record in the current proceeding. The administrative notice request was contained in both the Application and the Stipulation,[6] both of which were filed on April 13, 2012. In the almost two months between when the Application and Stipulation were filed and when the hearing began, no party, including OCC and NOPEC, raised any objection or concern about incorporation of *the entire ESP II record*, even though these parties and others opposing the Stipulation raised numerous other specific procedural and substantive objections[7] and filed numerous sets of discovery over that time period.

It was only at the hearing where some opposing parties raised concern about incorporation of the record, and this was only after the Attorney Examiner himself expressed

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[5] *Id.*, 40 Ohio St.3d at 186, 532 N.E.2d at 1310.

[6] Application at 5; ESP III Stipulation at 44.

[7] *See, e.g.,* Case No. 12-1230-EL-SSO, Joint Motion to Bifurcate Issues and Memorandum Contra FirstEnergy's Motion for Waiver of Rules by Environmental Law and Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Office of the Ohio Consumers' Council (April 17, 2012); Joint Motion to Extend Procedural Schedule and Joint Motion for Continuance of the Evidentiary Hearing and Request for Expedited Ruling by Environmental Law and Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Office of the Ohio Consumers' Counsel, Ohio Environmental Council, Sierra Club (April 26, 2012); Joint Motion for Continuance of the Evidentiary Hearing or, in the Alternative, Joint Motion for a Partial Continuance to Consider Customer Bill Impacts and Joint Motion for Extension of the Time for Filing Testimony of Parties Not Signing FirstEnergy's Stipulation and Request for Expedited Ruling by Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Office of the Ohio Consumers' Council (June 1, 2012).

reservations about incorporating the full record from the ESP II case.[8] It is noteworthy that while the Attorney Examiner requested a list of materials from the ESP II case that FirstEnergy wanted incorporated into the record, he noted that "administrative notice will be liberally taken."[9] On the third day of the hearing, the Attorney Examiner took administrative notice of a limited amount of material from the ESP II case requested by FirstEnergy, as well as the testimony of Dr. Dennis Goins from Case 09-906-EL-SSO, as requested by Nucor.[10]

NOPEC's and OCC's complaints that they were somehow prejudiced by administrative notice being taken, or that they did not have an opportunity to rebut the evidence administratively noticed, ring hollow. NOPEC and OCC complain that they were not aware of the evidence being taken notice of until the last day of the hearing,[11] but these parties are focusing on the wrong point in time. As noted above, NOPEC and OCC knew, or should have known, right from the start that FirstEnergy and the other parties to the Stipulation were requesting that the entire record from Case No. 10-388-EL-SSO be incorporated into the record in the current proceeding, since the request was included in both the Stipulation and the Application. NOPEC and OCC could have immediately objected to the administrative notice request at that point (after all, they raised many other procedural concerns right out of the gate), asked discovery of FirstEnergy and the other parties to determine which portions of the record from the ESP II case they planned to rely on, or presented their own responsive evidence

[8] Tr. Vol. I at 26-29.

[9] *Id.* at 29.

[10] Tr. Vol. III at 170-71.

[11] NOPEC Application for Rehearing at 18-21; OCC Application for Rehearing at 61.

in testimony. Instead, NOPEC and OCC took no steps to oppose, limit, or even better understand the implications of the administrative notice request.

As if the explicit request for administrative notice contained in both the Application and the Stipulation were not enough, the very same administrative notice request (to incorporate the full record from the Case No. 09-906-EL-SSO) was made in the ESP II case, and both OCC and NOPEC strenuously opposed that request (although apparently NOPEC made peace with the notion since NOPEC eventually signed the stipulation in that case). The issue was fully litigated in the ESP II case, and was resolved in favor of incorporation of the full record from Case No. 09-906-EL-SSO.[12] Administrative notice was a major issue in the last case, and anyone who participated in that case should have reasonably foreseen that the same issue would arise in this case. Given all this, NOPEC and OCC cannot credibly claim now that the administrative notice request was "sprung" on them at the hearing, or that they had no opportunity to address or rebut the evidence from the ESP II case that was incorporated into the record in this case.

Finally, OCC and NOPEC, relying on a strict reading of Ohio Rule of Evidence 201(B), argue that the Commission erred by taking administrative notice of expert testimony and opinions rather than just "facts."[13] The problem with this argument is that the relevant case law does not limit the scope of evidence that the Commission can take notice of to just facts and, as the Commission notes, no party cited a case demonstrating that the Commission is

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[12] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison 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 No. 10-388-EL-SSO, Entry (April 6, 2010); *aff'd,* Entry on Rehearing (May 13, 2010).

[13] OCC Application for Rehearing at 61-62; NOPEC Application for Rehearing at 22-24.

strictly bound by the Ohio Rules of Evidence.[14] In fact, the courts have held that the Commission is not strictly confined to the rules of evidence in the course of conducting its proceedings.[15]

Precedent is clear that the Commission has the discretion to take administrative notice of a much wider body of evidence than OCC and NOPEC claim.[16] OCC tacitly recognizes this elsewhere in its application for rehearing, where it requests that the Commission take administrative notice of the audit reports filed in Case No. 11-5201-EL-RDR, which by any reasonable assessment include content (such as expert analysis and recommendations) beyond facts.[17] The Commission's decision to take administrative notice of expert testimony and other evidence not limited to "facts" from the ESP II case is not grounds for rehearing.

In summary, taking administrative notice of limited portions of the ESP II record was reasonable and completely consistent with long-standing Commission and court precedent on administrative notice. NOPEC's and OCC's requests for rehearing on this issue should be denied.

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[14] July 18 Order at 19.

[15] *Greater Cleveland Welfare Rights v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982).

[16] *See Allen*, 40 Ohio St.3d at 185, 532 N.E.2d at 1309 (upholding Commission's decision to take administrative notice of the record from an earlier proceeding); *see also, supra,* fn.12.

[17] OCC Application for Rehearing at 22, fn.72. It is also worth noting that, in Case No. 11-346-EL-SSO *et al*, OCC recently requested that the Commission take administrative notice of expert testimony and hearing transcripts from a prior case – the exact type of evidence OCC objects to the Commission taking administrative notice of here. *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 §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan,* Case Nos. 11-346-EL-SSO and 11-348-EL-SSO and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority,* Case Nos. 11-349-EL-AAM and 11-350-EL-AAM, Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network (July 20, 2012).

B. The Commission Reasonably Approved the Revision to Rider AER Allowing for Recovery of Rider AER Costs to be Spread Out Over a Longer Period of Time

OCC and RESA argue that alternative energy compliance costs under Rider AER should not be spread out, as proposed in the ESP III Stipulation and approved by the Commission in the July 18 Order. In its application for rehearing, RESA argues that spreading Rider AER costs will distort price signals and dampen shopping.[18] However, no study or analysis was presented demonstrating that adjusting the Rider AER charge actually would dampen shopping and, in fact, the very high level of shopping in the FirstEnergy service territory prompted the need to incorporate a mechanism allowing for the spreading of Rider AER costs in the first place. As Nucor explained in its initial brief, since the renewable energy requirement is applied to an historical SSO baseline, and since there has been such a large drop in SSO load over the past several years due to shopping, a much smaller amount of SSO load is today carrying renewable energy costs reflective of a much larger historical baseline amount of SSO load, placing a disproportionate burden on current SSO customers.[19] Spreading out these costs would have a significant benefit to current SSO customers (as RESA notes, spreading recovery of Rider AER costs over a longer period will reduce the Rider AER price by between 56% and 65%).[20] Clearly, the Commission had a reasonable basis to determine that the price smoothing impact of the change to Rider AER outweighed the effect of the potential carrying costs.[21]

In its application for rehearing, OCC offers a new rationale for why the Commission should rehear its approval of the AER deferral mechanism. OCC notes that the Exeter Report

[18] RESA Application for Rehearing at 3-6.

[19] Nucor Initial Brief at 7-8.

[20] RESA Application for Rehearing at 3-4.

[21] July 18 Order at 35.

recently filed in Case No. 11-5201-EL-RDR recommends a disallowance of certain renewable energy credit ("REC") procurement costs, and states that "it is questionable whether FirstEnergy should be authorized to collect these procurement costs from customers at all, let alone deferring these costs for customers to pay with interest."[22] Nucor agrees with OCC that the findings of the Exeter Report with regard to FirstEnergy's procurement of RECs raise concerns that warrant further investigation, and it is only logical that if the Commission eventually disallows some REC procurement costs, customers should not be responsible for any carrying charges associated with such disallowed costs.

However, these issues should be addressed in Case No. 11-5201-EL-RDR, not here. That case is examining FirstEnergy's actual alternative energy expenditures, while this ESP III proceeding only addresses the structure of the Rider AER cost recovery mechanism going forward. Whether or not the Commission orders a disallowance of any of FirstEnergy's REC procurement costs as a result of the investigation in Case No. 11-5201-EL-RDR, the deferral mechanism approved in the July 18 Order is still a useful tool for moderating the impact of Rider AER costs when necessary for FirstEnergy's standard service offer customers.

C. Extension of FirstEnergy's Interruptible Rates (Rider ELR and OLR) Provides Substantial Benefits

Both OCC and NOPEC cite to the Dissenting Opinion to argue that the continuation of Riders ELR and OLR is not a quantitative benefit of ESP III. We believe that the record evidence demonstrates otherwise. We respectfully submit that the record shows that Rider ELR provides significant benefits consistent with policy goals established by Ohio law.

[22] OCC Application for Rehearing at 23.

While they do not discuss the riders in much detail, NOPEC and OCC do assert, without pointing to any evidence, that Riders ELR and OLR are "above-market rates" as compared to demand response in the PJM markets.[23] This assertion is not supported by the record. The "above-market rate" assertion relies on the notion that the Rider ELR credit can and should be compared with the short-run price of capacity as determined in the PJM reliability pricing model ("RPM") markets and that such a comparison would show that Rider ELR credits are "above market." This approach is flawed for at least three reasons:

- First, as explained below and in Nucor's reply brief, Rider ELR provides considerable benefits beyond just those provided by PJM capacity, and Rider ELR cannot be compared on an apples-to-apples basis with the PJM capacity product.
- Second, even when focusing only on the capacity benefit of Rider ELR, as Nucor's witness Dr. Goins explained, a reasonable interruptible credit should reflect the long-run avoided cost of capacity instead of the short-run market price of capacity produced by the PJM RPM.[24] Dr. Goins explained that long-run avoided costs reflect the cost of adding new capacity to meet demand growth, while highly fluctuating short-run prices do not send a clear signal regarding the cost of capacity to serve future peak loads.[25] Since short-run prices are unstable and unpredictable, using them as the basis for an interruptible credit could impede efforts to secure needed

[23] NOPEC Application for Rehearing at 8; OCC Application for Rehearing at 2.

[24] Direct Testimony of Dr. Dennis W. Goins on Behalf of Nucor Steel Marion, Inc. in Case No. 09-906-EL-SSO at 31 (admitted through administrative notice).

[25] *Id.*

demand response.[26] Using the long-run avoided cost measure recommended by Dr. Goins, the current Rider ELR credit is substantially undervalued.[27]

- Third, even if the short-run value of capacity in the PJM market were the benchmark against which an interruptible credit should be measured, the May 2012 PJM base residual auction produced a capacity price for the ATSI zone well in excess of the current ELR credit, which under the OCC/NOPEC theory, would suggest that the Rider ELR credit is below market, not "above market."[28]

In short, for all of these reasons, the evidence on the record is contrary to OCC's and NOPEC's assertion that Rider ELR is an "above-market rate."

Moreover, NOPEC and OCC ignore the fact that Rider ELR and PJM capacity are very different products, with Rider ELR providing considerably more flexibility, value and optionality to FirstEnergy and the system, and therefore providing a greater benefit than PJM demand response.[29] To take one important example, customers under Rider ELR are subject to both reliability interruptions and "economic" interruptions. Economic interruptions are called when the market price for generation exceeds 1.5 times the SSO generation price. When an economic interruption is called, the ELR customer must curtail, or "buy-through" the

[26] *Id.*

[27] *Id.* at 26-32.

[28] In the May 2012 BRA, capacity cleared at $357/MW/day. AEP Retail Ex. 1. This figure is equivalent to $10.86/kW/month, a figure considerably in excess of the current Rider ELR credit. (($357/MW/Day*365 days)/12 months)=$10,858/MW/month or $10.86/kW/month.

[29] For example, Rider ELR includes a provision for "economic" interruptions. ESP III Stipulation (Company Ex. 1), Attachment B, Rider ELR, Section E. Also, under Rider ELR, customers may be interrupted not only by PJM, but also by one of the FirstEnergy operating companies or ATSI in the case of an emergency. *Id.* at Section D. Rider ELR also can definitely be used by FirstEnergy to meet its statutory peak demand reduction requirements (Tr. Vol. 1 at 66), while it is unclear whether or under what circumstances interruptible load that is bid into the PJM capacity markets either directly by a customer or through a CSP could be used for this purpose.

interruption at the market rate. Since SSO bidders know that they will not have to serve very large industrial customers at their bid prices when market prices get high, they can submit lower bids than if the economic interruption option under ELR were not available, resulting in lower generation prices for all SSO customers.[30]

Since economic interruptions under Rider ELR are specifically tied to the prices achieved in the FirstEnergy SSO generation auctions, there is no comparable economic demand response product available in the wider PJM market. The ELR product, in other words, is uniquely tailored to the design of FirstEnergy's retail rate structure (unlike the more generic PJM demand response product), and provides specific benefits to FirstEnergy's customers that could not be achieved if customers simply participated directly (or through a curtailment service provider) in PJM's markets.

It is also important to note that in enacting S.B. 221, rather than simply rely upon the marketplace, the Legislature specifically contemplated a role for regulated utilities in facilitating demand response when it mandated peak demand reduction benchmarks for such utilities.[31] Rider ELR helps to fulfill that role. Having an established retail interruptible rate like Rider ELR available is a better way to secure long-term, stable interruptible load both to meet the benchmarks and to provide economic and reliability benefits than relying on the participation of retail customers in PJM's wholesale markets.[32]

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[30] Tr. Vol. I at 70; Tr. Vol. III at 99.

[31] Section 4928.66(A)(1)(b), Revised Code.

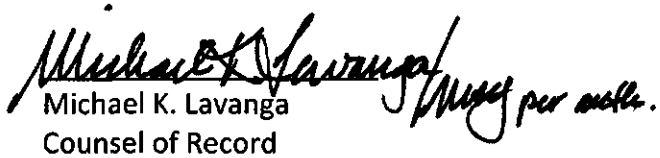
[32] The Commission has recognized the importance of including interruptible rate options in standard service offer rate plans. In the market rate offer plan FirstEnergy proposed in 2008, one of the reasons the Commission gave for rejecting the plan was FirstEnergy's failure to include interruptible rates. *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply,*

Finally, Rider ELR, in particular, also provides significant economic development and job retention benefits. Low, competitive electric rates are crucial to maintaining Ohio industry. Interruptible customers are typically the customers most sensitive to electric prices (after all, they choose lower quality service in order to obtain more competitive rates). By providing a relatively steady and reasonable value for interruptibility over a reasonable time period, large industrial customers can count on Rider ELR credits as a moderating influence on the price of power, helping to keep the overall price competitive.

III. CONCLUSION

For the reasons discussed above, Nucor respectfully requests that the Commission deny the applications for rehearing of the July 18 Order approving FirstEnergy's ESP III Stipulation as modified.

Respectfully submitted,



Michael K. Lavanga
Counsel of Record
PHV #1014-2012
E-Mail: mkl@bbrslaw.com
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007
(202) 342-0800 (Main Number)
(202) 342-0807 (Facsimile)

Attorneys for Nucor Steel Marion, Inc.

Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service, Case No. 08-936-EL-SSO, Opinion and Order at 24 (November 25, 2008).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission on this 27th day of August, 2012 upon the following:

James W. Burk
Arthur E. Korkosz
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Email: burkj@firstenergycorp.com
Email: korkosza@firstenergycorp.com

James F. Lang
Laura C. McBride
Calfee Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
Email: jlang@calfee.com
Email: lmcbride@calfee.com

David A. Kutik
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114
Email: dakutik@JonesDay.com

Robert Fortney
Tammy Turkenton
180 East Broad Street, 3rd Floor
Columbus, Ohio 43215
Email: Robert.fortney@puc.state.oh.us
Email: tammy.turkenton@puc.state.oh.us

Nolan Moster
Trent A. Dougherty
Cathryn N. Loucas
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43215
Email: nmoser@theoec.org
Email: trent@theoec.org
Email: cathy@theoec.org

Duane W. Luckey
Thomas McNamee
William L. Wright
Asst. Attorneys General
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
Email: duane.luckey@puc.state.oh.us
Email: Thomas.mcnamee@puc.state.oh.us
Email: William.wright@puc.state.oh.us

Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
Email: sam@mwncmh.com

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

David C. Rinebolt
Colleen L. Mooney
231 West Lima Street
Columbus, Ohio 43215
Email: drinebolt@aol.com
Email: cmooney2@columbus.rr.com

Larry S. Sauer
Terry L. Etter
Melissa R. Yost
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
Email: sauer@occ.state.oh.us
Email: etter@occ.state.oh.us
Email: yost@occ.state.oh.us

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
Email: myurick@taftlaw.com
Email: zkravitz@taftlaw.com

Leslie A. Kovacik
City of Toledo
420 Madison Avenue, Suite 100
Toledo, Ohio 43604-1219
Email: leslie.kovacik@toledo.oh.gov

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore & Pease, LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Email: mhpetricoff@vorys.com
Email: smhoward@vorys.com

Thomas J. Obrien
Bricker & Eckler LLP
100 S. Third Street
Columbus, Ohio 43215
Email: tobrien@bricker.com

Cynthia A. Brady
David I. Fein
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
Email: cynthia.brady@constellation.com
Email: david.fein@constellation.com

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, Ohio 43215
Email: kschmidt@ohiomfg.com

Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, Ohio 43215
Email: dane.stinson@baileycavalieri.com

Teresa Rigenbach
Direct Energy Services, LLC
5400 Frantz Road, Suite 250
Dublin, Ohio 43016
Email: Teresa.rigenbach@directenergy.com

Robert J. Triozzi
Steven L. Beeler
City of Cleveland Department of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
Email: rtriozzi@city.cleveland.oh.us
Email: sbeeler@city.cleveland.oh.us

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Email: robinson@citizenpower.com

Glenn S. Krassen
Matthew W. Warnock
Bricker & Eckler LLP
1375 E. 9th Street, Suite 1500
Cleveland, Ohio 44114
Email: gkrassen@bricker.com
Email: mwarnock@bricker.com

Gregory K. Lawrence
Cadwalader, Wickersham & Taft LLP
One World Financial Center
New York, NY 10281
Email: greg.lawrence@cwt.com

Morgan Parke
FirstEnergy Service Company
76 S. Main Street
Akron, Ohio 44308
Email: mparke@firstenergycorp.com

Gregory J. Dunn
Christopher Miller
Asim Z. Haque
Ice Miller
250 West Street
Columbus, Ohio 43215
Email: Gregory.dunn@icemiller.com
Email: Christopher.Miller@icemiller.com
Email: asim.haque@icemiller.com

Richard L. Sites
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, Ohio 43215
Email: ricks@ohanet.org

Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, Ohio 44113
Email: jpmeissn@lasclev.org

Amy Spiller
Duke Energy Business Services, Inc.
221 E. Fourth Street, 25th floor
Cincinnati, Ohio 45202
Email: amy.spiller@duke-energy.com

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
65 E. State Street, Suite 200
Columbus, Ohio 43215
Email: mdortch@kravitzllc.com

Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Ohio 43215
Email: henryeckhart@aol.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, Ohio 43016
Email: vparisi@igsenergy.com
Email: mswhite@igsenergy.com

Christopher J. Allwein
Williams, Allwein & Moser, LLC
1373 Grandview Avenue, Suite 212
Columbus, Ohio 43212
Email: callwein@wamenergylaw.com

John Borell
Lucas County Prosecutors Office
700 Adams Street, Suite 251
Toledo, Ohio 43604
Email: trhayslaw@gmail.com

Joseph M. Clark
Direct Energy
6641 North High Street, Suite 200
Worthington, Ohio 43085
Email: joseph.clark@directenery.com

Judi L. Sobecki
Randall V. Griffin
The Dayton Power & Light company
1065 Woodman Drive
Dayton, Ohio 45432
Email: judi.sobecki@dplinc.com
Email: randall.griffin@dplinc.com

Lisa G. McAlister
J. Thomas Siwo
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215
Email: lmcalister@bricker.com
Email: tsiwo@bricker.com

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

Gregory J. Poulos
EnerNOC, Inc.
471 East Broad Street, Suite 1520
Columbus, Ohio 43215
Email: gpoulos@enernoc.com

Craig I. Smith
15700 Van Aken Boulevard, Suite 26
Shaker Heights, Ohio 44120
Email: wttpmlc@aol.com

Barth E. Royer
Bell & royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215
Email: BarthRoyer@aol.com

Justin M. Vickers
Environmental Law & Policy Center
33 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
jvickers@elpc.org

Christopher Horn
3030 Euclid Avenue, Suite 406
Cleveland, Ohio 44118
Email: chorn@mcsherrylaw.com

Michael K. Lavanga

31251636.1