

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider	)	

In the Matter of the Application of	)	
Ohio Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority	)	

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**OHIO POWER COMPANY'S MOTION TO QUASH SUBPOENAS SERVED BY  
OHIO CONSUMERS COUNSEL AND MOTION *IN LIMINE* TO PRECLUDE  
HEARING TESTIMONY FROM THE SUBPOENAED WITNESSES**

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Pursuant to O.A.C. 4901-1-24, 4901-1-25(A) & (C), 4901-1-26 (E), 4901-1-27(B)(7), and Ohio Civil Rule 45, Ohio Power Company ("AEP Ohio") respectfully but urgently moves the Public Utilities Commission of Ohio ("Commission") to quash three subpoenas served by Ohio Consumers Counsel ("OCC") on December 29 & 30, 2015, which subpoenas were served upon signatory parties to the Joint Stipulation filed in the above-captioned proceeding. With these procedurally and substantively improper subpoenas, OCC wrongly seeks to elicit at hearing irrelevant, inadmissible, and privileged testimony from unnamed employees of the following signatory parties to the Joint Stipulation that is being supported at hearing by AEP Ohio's witness William Allen:

- (1) Direct Energy Business, LLC and Direct Energy Services, LLC (jointly, "Direct Energy");
- (2) Interstate Gas Supply, Inc. ("IGS"); and
- (3) Sierra Club.

For the reasons explained more fully below, in the motions to quash previously filed by these three signatory parties on December 31, 2015, and in the arguments presented by counsel to Attorney Examiners See and Parrot on January 4, 2016, the Commission should promptly quash these improper subpoenas and enter an order *in limine* precluding the admission of hearing testimony from the witnesses subpoenaed by OCC. Allowing OCC to elicit hearing testimony from the signatory party witnesses they have subpoenaed (and since deposed) would be unreasonable, would violate settled Commission practices and procedures, would violate Ohio's (and this Commission's) long-established public policy in favor of negotiated settlements, would undercut the attorney-client privilege and the confidentiality afforded settlement negotiations, and would chill productive settlement negotiations in future Commission proceedings.

Respectfully submitted,

/s/ Steven T. Nourse

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**Counsel for Ohio Power Company**

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

In December 2013, AEP Ohio filed an Application in its most recent Electric Security Plan proceeding seeking the establishment of a Power Purchase Agreement (“PPA”) Rider and the inclusion in the PPA Rider of AEP Ohio’s contractual entitlement to a share of the electrical output of generating units owned by the Ohio Valley Electric Corporation (“OVEC PPA”). In February 2015, the Commission issued an Opinion and Order approving the PPA Rider on a placeholder basis (Case No. 13-2385-EL-SSO *et al.*, Opinion and Order at pp. 25-27 (February 25, 2015)). In October 2014, AEP filed an Application in this proceeding (followed by an Amended Application in May 2015) seeking inclusion of a new affiliate power purchase agreement between AEP Ohio and AEP Generation Resources, Inc. (“Affiliated PPA”), as well as the OVEC PPA, in the PPA Rider. An evidentiary hearing was held in this proceeding in September and November 2015, which included the presentation of sworn testimony from over 35 witnesses.

On December 1, 2015, a meeting was held with all parties at which AEP Ohio presented a framework for a possible Joint Stipulation. After several additional all-party settlement meetings and numerous other settlement discussions and meetings, on December 14, 2015, AEP Ohio and nine other Signatory Parties entered into a Joint Stipulation and Recommendation (“Joint Stipulation”) proposing to resolve all issues in the above-captioned proceedings. That same day, AEP Ohio submitted the testimony of William Allen in support of the Joint Stipulation. Mr. Allen was made available for cross-examination at the hearing concerning the Joint Stipulation over two plus hearing days. No other witness submitted testimony to support the Joint Stipulation.

A few days after the Joint Stipulation was signed, OCC served voluminous and burdensome written discovery requests upon certain signatory parties to the Joint Stipulation: Direct Energy, IGS, and Sierra Club. The lengthy requests for admission, interrogatories, and requests for production in these written discovery requests asked these signatory parties, among other things, to admit or deny that they supported various provisions in the Joint Stipulation, to disclose any “analyses” that the signatory parties may have undertaken with respect to the Joint Stipulation, or to explain “why” the signatory parties agreed with various provisions therein. On December 23, 2015, OCC also served notices of deposition seeking testimony from unnamed employees of these same signatory parties.

On December 29, 2015, in three separate motions, OCC then moved the Commission for expedited issuance of subpoenas seeking hearing testimony from unnamed employees of these signatory parties at the hearing which was to commence just six days later, on January 4, 2016. Copies of these three motions are appended hereto as Exhibits A-C. Each of OCC’s three motions appending the subpoenas sought to compel attendance at the hearing by a witness

who has knowledge and expertise regarding the Joint Stipulation and Recommendation \*\*\* filed on December 15, 2015 in this case. Such witness(es) shall be familiar with [signatory party's] position regarding the Stipulation (as a whole), and the specific terms and conditions within the Stipulation.

(See OCC's Motions for Subpoena and Expedited Treatment (Dec. 29, 2015).) OCC served the three subpoenas attached to their motions on December 29 & 30, 2015. Direct Energy, IGS, and Sierra Club promptly filed separate motions to quash the subpoenas two days later, on December 31, 2015.

In their motions to quash the subpoenas, Direct Energy, IGS, and Sierra Club noted several fundamental procedural and substantive defects in OCC's subpoenas. Direct Energy noted that the subpoenas were unduly burdensome, that they seek information not likely to lead to admissible evidence, and that they concern information protected by the attorney-client privilege. IGS raised many of the same challenges to OCC's improper subpoenas, agreeing that OCC's subpoenas are intended "to harass IGS for its willingness to enter into a settlement." (IGS Motion to Quash at 2.) For its part, Sierra Club echoed many of these compelling concerns, and also noted that OCC's subpoena impinges on Sierra Club's (and its members') fundamental First Amendment rights of association. (Sierra Club Motion to Quash at 10-15.) With support from the Declaration of its Deputy Director, Nahaliel Kanfer, Sierra Club also noted that "allowing OCC to probe Sierra Club's strategy [for joining the Joint Stipulation] would discourage individuals from participating in initiative campaigns and mute the exchange of ideas within those campaigns; which would in turn discourage people from joining or working with Sierra Club." (*Id.* at 11.)

Counsel for AEP Ohio and these three signatory parties presented many of these same concerns to Attorney Examiners See and Parrott in oral arguments at hearing on January 4, 2016.

An excerpt from the relevant portion of the hearing transcript is attached hereto as Exhibit D. (See generally Tr. Vol. XVIII, pp. 4438-4460). Counsel for AEP Ohio explained to the Attorney Examiners the extremely negative precedent that would result from requiring parties to a stipulation to produce hearing witnesses merely because they signed a stipulation. (*Id.* at 4439.) Imposing such an onerous requirement is likely to deter parties from becoming signatory parties to future stipulations. Counsel for AEP Ohio noted that its sponsoring witness, Mr. Allen, was fully prepared to take the stand and answer any questions concerning the Joint Stipulation, and that it would be improper to compel testimony from the signatory parties' employees concerning the Joint Stipulation. (*Id.*) AEP Ohio's Counsel agreed with Sierra Club's position that compelling the signatory parties' employees to testify at hearing would have a severe chilling effect on the attorney-client privilege, as well as the possibility of confidential settlement negotiations in Commission proceedings. (*Id.*; see also *id.* at 4451.) Counsel also noted that testimony from such witnesses would in no way be relevant to the three-part test that the Commission and the Supreme Court have approved for consideration of contested stipulations. (*Id.* at 4440; see also *id.* at 4451.) Counsel for Sierra Club concurred, noting that "[t]here is no nonpublic relevant factual information that could come to light in the testimony of [a] Sierra Club witness" concerning the Joint Stipulation, and that it would be a "waste of the Commission's time and it would be oppressive for Sierra Club to produce someone to testify on privileged matters \*\*\* [.]". (*Id.* at 4441.) Counsel for IGS and Direct Energy wholeheartedly agreed, also noting how the compulsion of hearing testimony from their employees about the Joint Stipulation would violate the Commission's rules. (*Id.* at 4442-43.)

In response, OCC's counsel referred to its memorandum contra the signatory parties' motions to quash and posited that OCC has "questions to ask them about the stipulation that they

signed,” thereby confirming OCC’s goal to delve into the confidential settlement process. (*Id.* at 4444.) OCC also confirmed its unmistakable (and improper) intention to use hearing testimony from the signatory parties to go beyond the four corners of the signed Joint Stipulation, saying: “that is why we have asked them to appear at the hearing so we could ask questions about the meaning of” what OCC characterized as “the vague and ambiguous stipulation and in particular the footnotes that they included in the stipulation.” (*Id.* at 4447-48.) OCC’s counsel also made the rather remarkable contention that the Joint Stipulation – a signed agreement – “does not and cannot speak for itself.” (*Id.* at 4457.)

After hearing arguments from the parties’ counsel concerning OCC’s subpoenas for hearing testimony by employees of Sierra Club, Direct Energy, and IGS, the Attorney Examiners deferred ruling on the motions to quash for the time being, promising not to defer for too long in light of the procedural schedule for the hearing. (*Id.* at 4459.) At the same time, however, the Attorney Examiners did order each of those signatory parties to produce a witness for the depositions noticed by OCC. (*Id.* at 4460.) In order to preserve the separate ruling on whether the deponents would be involuntarily required to testify and give opinions about the Stipulation, the Attorney Examiners instructed OCC not to file the deposition transcripts. Now that the depositions have occurred and OCC gained no useful insights or probative information, the exercise in harassment and intimidation should be terminated. Similarly, now that Mr. Allen has completed his testimony in support of the Stipulation, it is evident that there were no meaningful or pertinent questions about the Stipulation that have not been addressed by the one witness presented to support the Stipulation; so there is no need to compel testimony from others. This is particularly true given that the testimony elicited at the depositions was largely duplicative of what was brought out during Mr. Allen’s cross examination by OCC and others. AEP Ohio

respectfully submits that the Commission should promptly grant this Motion to Quash and the three signatory parties' December 31, 2015 Motions to Quash and issue an order *in limine* precluding hearing testimony from the witnesses subpoenaed by OCC.

## **II. ARGUMENT**

### **A. The Commission is empowered by its rules, as well as the Ohio Rules of Civil Procedure, to quash the objectionable OCC subpoenas and to issue an order *in limine* precluding the irrelevant, inadmissible, and privileged hearing testimony sought by OCC's improper subpoenas.**

There are multiple rules empowering the Commission to quash OCC's improper subpoenas and issue an order *in limine* precluding the hearing testimony sought by the subpoenas, to thereby protect the integrity of the Commission's stipulation and hearing process. O.A.C. 4901-1-24(A)(4) empowers the Commission to issue "any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that "(4) certain matters not be inquired into." O.A.C. 4901-1-25(C), in turn, allows the Commission, upon its own motion or that of any party, to "quash a subpoena if it is unreasonable or oppressive." O.A.C. 4901-1-26(E) provides that evidence of conduct or statements made in compromise negotiations is generally not admissible. The Commission's rule on hearings, O.A.C. 4901-1-27(B)(7), further provides that the presiding hearing officer may rule on objections and take "such actions as are necessary" to avoid unnecessary delay; prevent the presentation of irrelevant or cumulative evidence; prevent argumentative, repetitious, cumulative, or irrelevant cross-examination; and assure that the hearing proceeds in an orderly and expeditious manner. Ohio's Rules of Civil Procedure, in similar fashion, contain provisions designed to protect persons subject to subpoenas and to enable motions to quash subpoenas that subject persons to undue burden or require the disclosure of "privileged or otherwise protected matter." Civ.R. 45(C)(3).

The Commission has previously invoked these rules and powers to address improper subpoenas and issue orders precluding irrelevant and inadmissible testimony. *E.g., In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Entry at 10-11 (Oct. 22, 2012) (quashing unduly broad and burdensome subpoena); *see also id.*, Entry on Rehearing at 18 (Sept. 30, 2013) (affirming exclusion of testimony by engineer who had no experience in the relevant industry and relied on third-party information). *See also In the Matter of the Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-693-EL-CSS, Entry at 3-4 (Mar. 30, 2011) (quashing subpoena seeking information outside the scope of discovery). For the reasons described below and in the three signatory parties' motions to quash, the circumstances here present another occasion when action is sorely needed to prevent an abuse of the Commission's hearing process.

**B. OCC's subpoenas for hearing testimony seek irrelevant and inadmissible hearing testimony from signatory party witnesses concerning the Stipulation.**

As counsel for AEP Ohio and the three subpoenaed signatory parties explained to the Attorney Examiners, the subpoenas should be quashed because they seek to compel testimony from witnesses who can provide no relevant, admissible testimony concerning the Joint Stipulation. Mr. Allen – the only witness to have filed testimony concerning the Joint Stipulation – has taken the stand as the sponsoring witness for the Joint Stipulation and was available to answer any question that the parties or the Attorney Examiners may have concerning the Joint Stipulation. The three signatory parties whose (unnamed) employees were subpoenaed here have filed no such testimony supporting the stipulation and have no non-privileged testimony to offer that is relevant here. It would be inappropriate to force parties that are signing and supporting a stipulation such as this one to bear the burden and expense of producing

witnesses in what amounts to a punishment for supporting the stipulation, particularly when the witnesses would have no non-privileged information to share concerning the stipulation itself or the confidential negotiations that led to it.

As this Commission well knows, the Ohio Supreme Court has approved a three-part test for the Commission to apply when considering a contested stipulation such as the one at issue here. The Joint Stipulation (1) must be a product of serious bargaining among capable, knowledgeable parties; (2) it must, as a package, benefit ratepayers and the public interest; and (3) it must not violate any important regulatory principle or practice. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992), and *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82-83, 765 N.E.2d 862 (2002). Mr. Allen's prefiled testimony addresses these points in comprehensive fashion and the witnesses subpoenaed by OCC from the signatory parties have nothing to add beyond Mr. Allen's testimony that goes to these points and would not be protected by applicable privileges for the reasons described *infra*.

The Commission's own rules expressly recognize that not all signatory parties may provide relevant, admissible testimony concerning a stipulation. That is why O.A.C. 4901-1-30 provides that "parties who file a full or partial written stipulation \*\*\* must file or provide the testimony of at least one signatory party that supports the stipulation." (Emphasis added). Here, AEP Ohio is the one signatory party who has filed the testimony of Mr. Allen to support the stipulation. The Commission's rules require no additional testimony from other signatory parties, and to compel such testimony here as a result of OCC's improper subpoenas would simply discourage these and other parties from ever becoming *signatory* parties to any future negotiated stipulations.

Moreover, the Attorney Examiner Entry that established the procedural schedule in this case provided for two deadlines for testimony relating to the Stipulation, for supporting and opposing testimony, and both deadlines have passed. OCC did not timely file or bring forth the testimony it now seeks to present through compulsion. Only supporting testimony of AEP Ohio witness Allen and the eleven pieces of opposing testimony filed on December 28 should be permitted. The Signatory Parties bear the risk of any shortcoming in the presentation of the supporting testimony or the potential for a finding that the three-part test is not satisfied. If there are critical questions that are unanswered, OCC should have brought those points out on cross examination and may do so on brief. It would violate the established procedural schedule to permit OCC to shore up its points by hauling unwilling parties into the hearing room for compulsory testimony.

OCC submits that the Joint Stipulation is vague and ambiguous, and that “given a vague and ambiguous contract, questions about the meaning of the document are completely and utterly appropriate.” (Ex. D, Tr. Vol. XVIII, at 4446.) But OCC’s apparent analogy to contract law’s “parol evidence” rule is completely inapposite. If OCC believes that there is ambiguity in the Joint Stipulation, OCC may present its concerns to the Commission through briefing and request that the Commission resolve the ambiguity in its order adopting or rejecting the Joint Stipulation. To bring these concerns to the Commission, OCC does not need to essentially penalize the signatory parties by forcing their representatives to testify. OCC and other opposing parties were free to question Mr. Allen concerning the Joint Stipulation, and indeed they did so in multiple hearing days. That gave them more than ample opportunity to lay the foundation for an argument in briefing that the Joint Stipulation is “vague and ambiguous.”

**C. OCC's subpoenas for hearing testimony intrude on the attorney-client privilege and the confidentiality of settlement negotiations.**

Allowing OCC to subpoena hearing testimony from employees of the three signatory parties will also undermine the attorney-client privilege and the confidentiality routinely (and properly) associated with settlement negotiations. Sierra Club summarized this issue succinctly in its oral arguments before the Attorney Examiners on January 4, saying:

The problem [with OCC's subpoenas] is that Sierra Club's staff, the only information they have on the stipulation is either information gained during settlement negotiations or in discussion with Sierra Club attorneys about the stipulation. There is no nonpublic relevant factual information that could come to light in the testimony of Sierra Club witnesses. It would be a waste of the Commission's time and it would be oppressive for Sierra Club to produce someone to testify on privileged matters essentially.

As far as Sierra Club \*\*\* the one issue OCC has asked about is Sierra Club's rationale for entering the stipulation. I think those types of issues are highly privileged. They go right to the attorney-client relationship. Decisions to enter a settlement obviously involve a lot of balancing a lot of factors.

(Exh. D, Tr. Vol. XVIII, at 4441 (emphasis added)).

Unlike the Company or the OCC and some of the other parties, the three Signatory Parties at issue with the subpoenas do not have a stable of local regulatory experts or support staff. Rather, these parties have for whatever reason participated in litigation and settlement in this case primarily through their attorneys. Thus, it is likely that compulsory testimony about the settlement will intrude upon the attorney-client privilege.

Indeed, as Sierra Club has explained, and as other signatory parties have echoed, there is no way for OCC to delve into the internal deliberations of the signatory parties regarding the Joint Stipulation without immediately encountering inadmissible, privileged attorney-client communications or confidential work product. Likewise, there is no way for OCC to question the signatory parties regarding the process that led to the Joint Stipulation without necessarily

eliciting inadmissible testimony concerning settlement negotiations in which the signatory parties' counsel participated. The attorney-client privilege and the inadmissibility of confidential settlement negotiations are long-established, critical protections that should be defended. Since OCC's subpoenas would necessarily elicit testimony protected by those doctrines, the subpoenas are improper.

In supporting its oppressive subpoenas, OCC relies on *Ohio Consumers Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, but that case is plainly inapposite. In that case, as the Court explained, "OCC [was] *not* seeking to discover the communications made during settlement negotiations but, rather, the terms of [certain] side agreements and the agreements themselves." *Id.* at 322-23 (emphasis added). Here, there are no "side agreements" that OCC wishes to elicit. Instead, OCC's subpoenas seek to do exactly what OCC refrained from doing in *Ohio Consumers Counsel*: "to discover the communication made during settlement negotiations." *Id.* Moreover, *Ohio Consumers Counsel* in no way lessened the critical protections of attorney-client privilege, and no matter the applicability of the settlement communications *privilege* addressed in that case, confidential settlement discussions are indisputably *inadmissible*. See O.A.C. 4901-1-26(E). Thus, as discussed above, any testimony OCC is likely to elicit from signatory parties' representatives will be inadmissible as reflecting either attorney-client communications or confidential settlement negotiations. That is an onerous and inappropriate effort and finds no support in *Ohio Consumers Counsel*.

**D. OCC's subpoenas for hearing testimony are contrary to the strong public policy in favor of settlement and create disincentives for settlement in future Commission proceedings.**

The Commission should encourage settlement of Commission proceedings, since settlement saves considerable time and resources of the parties, the Commission, and its Staff, and because settlement often involves a package compromise acceptable to numerous

stakeholders, a result that could not be reached without the confidential input of all negotiating parties. Yet OCC's subpoenas would create a profound disincentive to settlement. If settling parties can be forced to produce a representative for questioning at the Commission – where the questions would necessarily delve into privileged attorney-client communications or confidential settlement negotiations – then parties will be discouraged from signing stipulations in the future. Indeed, as discussed above, OCC's subpoenas essentially act as a "penalty" for settlement. That is improper, and the subpoenas should be quashed.

### **III. CONCLUSION**

For all of the foregoing reasons, for the reasons set forth in the Motions to Quash filed by IGS, Direct Energy, and Sierra Club on December 31, 2015, and for the reasons articulated by counsel to Attorney Examiners See and Parrot on January 4, 2016, AEP Ohio respectfully but urgently asks the Commission to quash OCC's improper subpoenas and to issue an order *in limine* precluding hearing testimony from the subpoenaed witnesses. The Commission's prompt attention to this matter is necessary to preserve the integrity of confidential settlement communications and the stipulation process not only in this proceeding, but in any future proceeding that parties may attempt to resolve in good faith through a negotiated process.

Respectfully submitted,

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**Counsel for Ohio Power Company**

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion was served upon the parties of record in this proceeding by electronic service this 6th day of January, 2016.

/s/ Steven T. Nourse

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## Exhibit A

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**MOTION FOR SUBPOENA AND EXPEDITED TREATMENT  
*DUCES TECUM*  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Now comes the Office of the Ohio Consumers' Counsel ("OCC") and, pursuant to Ohio Adm. Code 4901-1-25, hereby respectfully moves the Public Utilities Commission of Ohio ("PUCO"), any commissioner, the legal director, the deputy legal director, or an attorney examiner to issue a subpoena *duces tecum* compelling Direct Energy to produce a witness(es) who has knowledge and expertise regarding the Joint Stipulation and Recommendation ("Stipulation") filed on December 15, 2015 in this case. Such witness(es) shall be familiar with Direct Energy's position regarding the Stipulation (as a whole), and the specific terms and conditions within the Stipulation. In accordance with Ohio Adm. Code 4901-1-25(2)(B) OCC requests expedited treatment of this subpoena.

Direct Energy's witness(es) shall testify and appear at the hearing to be subject to cross-examination on January 4, 2016, at 10:00 a.m., at the offices of the PUCO, 180 East

Broad Street, 11th floor, Hearing Room 11-A, Columbus, Ohio 43215-3793, and attend from day-to-day until the hearing is completed.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016, at the offices of the PUCO, pursuant to Ohio Adm. Code Rules 4901-1-25(A) (1) all documents relating to his/her responsibilities with respect to the Stipulation filed in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM; (2) responses to discovery that were authored by the witness(es) or were provided to OCC with input from the witness(es); (3) any documents in Direct Energy's possession that were relied upon to assess the Stipulation. Grounds for this Motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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(willing to accept email service)

**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority.	)	

---

**MEMORANDUM IN SUPPORT**

---

In this phase of the proceeding, the PUCO will consider whether the Stipulation is in the public interest and should be adopted. The Attorney Examiner has ruled that a hearing should be held regarding the provisions of the Stipulation.<sup>1</sup> And the Attorney Examiner adopted a procedural schedule allowing for additional discovery to be conducted, including depositions. Under the Attorney Examiner's ruling, OCC is entitled to, inter alia, conduct pre-hearing discovery, including depositions.

The OCC requests a subpoena, pursuant to Ohio Adm. Code 4901-1-25, to command Direct Energy to produce a person(s) to appear at the hearing and provide oral testimony through cross-examination on January 4, 2016 on matters known or reasonably available to Direct Energy regarding the Stipulation in this case. Specifically, OCC requests that Direct Energy be compelled to produce a witness(es) who has knowledge and

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<sup>1</sup> Entry (Dec. 15, 2015).

expertise regarding the Stipulation filed on December 15, 2015 in this case, and DIRECT ENERGY' position regarding the Stipulation.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016 and at offices of the PUCO, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the deponent(s). Additionally, the witness(es) shall bring any documents in Direct Energy's possession that Direct Energy relied upon to assess the Stipulation.

The information sought by OCC is central to the determination of whether the Stipulation is in the public interest. When evaluating a Stipulation, the PUCO's review for reasonableness must meet three criteria: (1) it must be a product of serious bargaining among capable, knowledgeable parties; (2) it must, as a package, benefit ratepayers and the public interest; and (3) it must not violate any important regulatory principle or practice.<sup>2</sup> The information from the Direct Energy witness(es) is important because Direct Energy is a signatory party and can speak to each of the three criteria. The PUCO will need this testimony in order to make a determination whether the Stipulation satisfies the three criteria. OCC's Motion for Subpoena *Duces Tecum* should be granted in order to facilitate a full and complete development of the case before the PUCO, including the ultimate record upon which the PUCO will base its decision.

---

<sup>2</sup> See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 1230 (1992) and *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82 – 83 (2002).

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)  
CONSUMERS' COUNSEL

/s/ William J. Michael

William J. Michael (Reg. No. 0070921)  
Counsel of Record

Jodi J. Bair (Reg. No. 0062921)

Kevin F. Moore (Reg. No. 0089228)  
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(willing to accept email service)

**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion for Subpoena Duces Tecum* was provided to the persons listed below, electronically, this 29th day of December, 2015.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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#### Attorney Examiners:

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STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573

John Kasich  
GOVERNOR



THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM

TO: Direct Energy Services, LLC  
C/O Statutory Agent  
~~C.T. Corporation System~~  
~~17 S. High Street~~  
~~Columbus, OH 43215~~

CORPORATE CREATIONS NETWORK  
119 E. COURT ST.  
CINCINNATI OH 45202

Upon application of Counsel for the Office of the Ohio Consumers' Counsel ("OCC"), Direct Energy is hereby required to provide a person(s) to appear before the Public Utilities Commission of Ohio as a witness for the Office of the Ohio Consumers' Counsel ("OCC") at hearing and attend day-to-day and submit to oral testimony by cross examination until completed for OCC in the following proceeding:

Case No.: 14-1693-EL-RDR and 14-1694.

Case Title: "In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider and In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority"

The witness(es) is to appear at the offices of the Commission, 180 East Broad Street, Columbus, Ohio on the 4<sup>th</sup> day of January, 2016 at 10:00 a.m. in hearing room 11-A.

The witness(es) shall bring with him/her, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case

No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the witness(es). Additionally, the witness(es) shall bring any documents in Direct Energy's possession that Direct Energy relied upon to determine whether to sign the Stipulation.

Dated at Columbus, Ohio, this 29th day of December, 2015.

BY:

Mandy Willey Epile

TITLE:

Heating Examiner

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/29/2015 4:07:13 PM**

**in**

**Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM**

Summary: Subpoena Motion for Subpoena and Expedited Treatment Duces Tecum by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.

## Exhibit B

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider.	)	
In the Matter of the Application of Ohio	)	
Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority.	)	

---

**MOTION FOR SUBPOENA AND EXPEDITED TREATMENT  
*DUCES TECUM*  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

Now comes the Office of the Ohio Consumers' Counsel ("OCC") and, pursuant to Ohio Adm. Code 4901-1-25, hereby respectfully moves the Public Utilities Commission of Ohio ("PUCO"), any commissioner, the legal director, the deputy legal director, or an attorney examiner to issue a subpoena *duces tecum* compelling Interstate Gas Supply, Inc. ("IGS") to produce a witness(es) who has knowledge and expertise regarding the Joint Stipulation and Recommendation ("Stipulation") filed on December 15, 2015 in this case. Such witness(es) shall be familiar with IGS's position regarding the Stipulation (as a whole), and the specific terms and conditions within the Stipulation. In accordance with Ohio Adm. Code 4901-1-25(2)(B) OCC requests expedited treatment of this subpoena.

IGS' witness(es) shall testify and appear at the hearing to be subject to cross-examination on January 4, 2016, at 10:00 a.m., at the offices of the PUCO, 180 East

Broad Street, 11th floor, Hearing Room 11-A, Columbus, Ohio 43215-3793, and attend from day-to-day until the hearing is completed.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016, at the offices of the PUCO, pursuant to Ohio Adm. Code Rules 4901-1-25(A) (1) all documents relating to his/her responsibilities with respect to the Stipulation filed in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM; (2) responses to discovery that were authored by the witness(es) or were provided to OCC with input from the witness(es); (3) any documents in IGS' possession that were relied upon to assess the Stipulation. Grounds for this Motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)  
CONSUMERS' COUNSEL

/s/ William J. Michael

William J. Michael (Reg. No. 0070921)  
Counsel of Record  
Jodi J. Bair (Reg. No. 0062921)  
Kevin F. Moore (Reg. No. 0089228)  
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**Office of the Ohio Consumers' Counsel**  
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(willing to accept email service)

**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority.	)	

---

**MEMORANDUM IN SUPPORT**

---

In this phase of the proceeding, the PUCO will consider whether the Stipulation is in the public interest and should be adopted. The Attorney Examiner has ruled that a hearing should be held regarding the provisions of the Stipulation.<sup>1</sup> And the Attorney Examiner adopted a procedural schedule allowing for additional discovery to be conducted, including depositions. Under the Attorney Examiner's ruling, OCC is entitled to, inter alia, conduct pre-hearing discovery, including depositions.

The OCC requests a subpoena, pursuant to Ohio Adm. Code 4901-1-25, to command IGS to produce a person(s) to appear at the hearing and provide oral testimony through cross-examination on January 4, 2016 on matters known or reasonably available to IGS regarding the Stipulation in this case. Specifically, OCC requests that IGS be compelled to produce a witness(es) who has knowledge and expertise regarding the

---

<sup>1</sup> Entry (Dec. 15, 2015).

Stipulation filed on December 15, 2015 in this case, and IGS' position regarding the Stipulation.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016 and at offices of the PUCO, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the deponent(s). Additionally, the witness(es) shall bring any documents in IGS' possession that IGS relied upon to assess the Stipulation.

The information sought by OCC is central to the determination of whether the Stipulation is in the public interest. When evaluating a Stipulation, the PUCO's review for reasonableness must meet three criteria: (1) it must be a product of serious bargaining among capable, knowledgeable parties; (2) it must, as a package, benefit ratepayers and the public interest; and (3) it must not violate any important regulatory principle or practice.<sup>2</sup> The information from the IGS witness(es) is important because IGS is a signatory party and can speak to each of the three criteria. The PUCO will need this testimony in order to make a determination whether the Stipulation satisfies the three criteria. OCC's Motion for Subpoena *Duces Tecum* should be granted in order to facilitate a full and complete development of the case before the PUCO, including the ultimate record upon which the PUCO will base its decision.

---

<sup>2</sup> See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 1230 (1992) and *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82 – 83 (2002).

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)  
CONSUMERS' COUNSEL

/s/ William J. Michael

William J. Michael (Reg. No. 0070921)

Counsel of Record

Jodi J. Bair (Reg. No. 0062921)

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(willing to accept email service)

**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion for Subpoena Duces Tecum* was provided to the persons listed below, electronically, this 29th day of December, 2015.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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**STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
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John Kasich  
GOVERNOR



**THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM**

**TO:** Interstate Gas Supply, Inc.  
C/O Statutory Agent  
~~5020 Bradenton Ave.~~ **6100 EMERALD PARKWAY**  
Dublin, OH 43017

Upon application of Counsel for the Office of the Ohio Consumers' Counsel ("OCC"), Interstate Gas Supply, Inc. ("IGS") is hereby required to provide a person(s) to appear before the Public Utilities Commission of Ohio as a witness for the Office of the Ohio Consumers' Counsel ("OCC") at hearing and attend day-to-day and submit to oral testimony by cross examination until completed for OCC in the following proceeding:

Case No.: 14-1693-EL-RDR and 14-1694.

Case Title: "In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider and In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority"

The witness(es) is to appear at the offices of the Commission, 180 East Broad Street, Columbus, Ohio on the 4<sup>th</sup> day of January, 2016 at 10:00 a.m. in hearing room 11-A.

The witness(es) shall bring with him/her, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case

No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the witness(es). Additionally, the witness(es) shall bring any documents in IGS's possession that IGS relied upon to determine whether to sign the Stipulation.

Dated at Columbus, Ohio, this 29th day of December, 2015.

BY:

*Mandy Willey Epiles*

TITLE:

*Attorney Examiner*

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/29/2015 4:05:46 PM**

**in**

**Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM**

Summary: Subpoena Motion for Subpoena and Expedited Treatment Duces Tecum by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.

## Exhibit C

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority.	)	

---

**MOTION FOR SUBPOENA AND EXPEDITED TREATMENT  
*DUCES TECUM*  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

Now comes the Office of the Ohio Consumers' Counsel ("OCC") and, pursuant to Ohio Adm. Code 4901-1-25, hereby respectfully moves the Public Utilities Commission of Ohio ("PUCO"), any commissioner, the legal director, the deputy legal director, or an attorney examiner to issue a subpoena *duces tecum* compelling Sierra Club to produce a witness(es) who has knowledge and expertise regarding the Joint Stipulation and Recommendation ("Stipulation") filed on December 15, 2015 in this case. Such witness(es) shall be familiar with Sierra Club's position regarding the Stipulation (as a whole), and the specific terms and conditions within the Stipulation. In accordance with Ohio Adm. Code 4901-1-25(2)(B) OCC requests expedited treatment of this subpoena.

Sierra Club's witness(es) shall testify and appear at the hearing to be subject to cross-examination on January 4, 2016, at 10:00 a.m., at the offices of the PUCO, 180 East

Broad Street, 11th floor, Hearing Room 11-A, Columbus, Ohio 43215-3793, and attend from day-to-day until the hearing is completed.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016, at the offices of the PUCO, pursuant to Ohio Adm. Code Rules 4901-1-25(A) (1) all documents relating to his/her responsibilities with respect to the Stipulation filed in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM; (2) responses to discovery that were authored by the witness(es) or were provided to OCC with input from the witness(es); (3) any documents in Sierra Club's possession that were relied upon to assess the Stipulation. Grounds for this Motion are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)  
CONSUMERS' COUNSEL

/s/ William J. Michael

William J. Michael (Reg. No. 0070921)  
Counsel of Record  
Jodi J. Bair (Reg. No. 0062921)  
Kevin F. Moore (Reg. No. 0089228)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
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**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate	)	
Power Purchase Agreement for	)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase	)	
Agreement Rider.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of	)	Case No. 14-1694-EL-AAM
Certain Accounting Authority.	)	

---

**MEMORANDUM IN SUPPORT**

---

In this phase of the proceeding, the PUCO will consider whether the Stipulation is in the public interest and should be adopted. The Attorney Examiner has ruled that a hearing should be held regarding the provisions of the Stipulation.<sup>1</sup> And the Attorney Examiner adopted a procedural schedule allowing for additional discovery to be conducted, including depositions. Under the Attorney Examiner's ruling, OCC is entitled to, inter alia, conduct pre-hearing discovery, including depositions.

The OCC requests a subpoena, pursuant to Ohio Adm. Code 4901-1-25, to command Sierra Club to produce a person(s) to appear at the hearing and provide oral testimony through cross-examination on January 4, 2016 on matters known or reasonably available to Sierra Club regarding the Stipulation in this case. Specifically, OCC requests that Sierra Club be compelled to produce a witness(es) who has knowledge and expertise

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<sup>1</sup> Entry (Dec. 15, 2015).

regarding the Stipulation filed on December 15, 2015 in this case, and Sierra Club's position regarding the Stipulation.

The subpoena should also compel the witness(es) to bring with him/her, and provide to OCC at 8:00 a.m. on January 4, 2016 and at offices of the PUCO, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the deponent(s). Additionally, the witness(es) shall bring any documents in Sierra Club's possession that Sierra Club relied upon to assess the Stipulation.

The information sought by OCC is central to the determination of whether the Stipulation is in the public interest. When evaluating a Stipulation, the PUCO's review for reasonableness must meet three criteria: (1) it must be a product of serious bargaining among capable, knowledgeable parties; (2) it must, as a package, benefit ratepayers and the public interest; and (3) it must not violate any important regulatory principle or practice.<sup>2</sup> The information from the Sierra Club witness(es) is important because Sierra Club is a signatory party and can speak to each of the three criteria. The PUCO will need this testimony in order to make a determination whether the Stipulation satisfies the three criteria. OCC's Motion for Subpoena *Duces Tecum* should be granted in order to facilitate a full and complete development of the case before the PUCO, including the ultimate record upon which the PUCO will base its decision.

---

<sup>2</sup> See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 1230 (1992) and *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 82 – 83 (2002).

Respectfully submitted,

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**Outside Counsel for the Office of the  
Ohio Consumers' Counsel**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion for Subpoena Duces Tecum* was provided to the persons listed below, electronically, this 29th day of December, 2015.

/s/ William J. Michael

William J. Michael

Assistant Consumers' Counsel

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**STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573**

John Kasich  
GOVERNOR



**THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM**

**TO:** Sierra Club  
c/o Statutory Agent  
National Registered Agents, Inc.  
1300 East Ninth St.  
Cleveland, OH 44114

Upon application of Counsel for the Office of the Ohio Consumers' Counsel ("OCC"), Sierra Club is hereby required to provide a person(s) to appear before the Public Utilities Commission of Ohio as a witness for the Office of the Ohio Consumers' Counsel ("OCC") at hearing and attend day-to-day and submit to oral testimony by cross examination until completed for OCC in the following proceeding:

Case No.: 14-1693-EL-RDR and 14-1694.

Case Title: "In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider and In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority"

The witness(es) is to appear at the offices of the Commission, 180 East Broad Street, Columbus, Ohio on the 4<sup>th</sup> day of January, 2016 at 10:00 a.m. in hearing room 11-A.

The witness(es) shall bring with him/her, all documents relating to his/her responsibilities with respect to the Stipulation in Case Nos. 14-1693-EL-RDR and Case

No. 14-1694-EL-AAM and responses to discovery that were authored by the witness or were provided to OCC with input from the witness(es). Additionally, the witness(es) shall bring any documents in Sierra Club's possession that Sierra Club relied upon to determine whether to sign the Stipulation.

Dated at Columbus, Ohio, this 29th day of December, 2015.

**BY:**

*Mandy Willey Eples*

**TITLE:**

*Attorney Examinee*

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/29/2015 4:04:34 PM**

**in**

**Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM**

Summary: Subpoena Motion for Subpoena and Expedited Treatment Duces Tecum by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.

## Exhibit D

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :  
Application Seeking :  
Approval of Ohio Power :  
Company's Proposal to : Case No. 14-1693-EL-RDR  
Enter into an Affiliate :  
Power Purchase Agreement :  
for Inclusion in the Power:  
Purchase Agreement Rider. :

In the Matter of the :  
Application of Ohio Power :  
Company for Approval of : Case No. 14-1694-EL-AAM  
Certain Accounting :  
Authority. :

- - -

PROCEEDINGS

before Ms. Greta See and Ms. Sarah Parrot, Attorney  
Examiners, and Commissioner Asim Haque at the Public  
Utilities Commission of Ohio, 180 East Broad Street,  
Room 11-A, Columbus, Ohio, called at 10 a.m. on  
Monday, January 4, 2016.

- - -

VOLUME XVIII

- - -

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- - -

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3 By Mr. Steven T. Nourse  
4 Mr. Matthew J. Satterwhite  
5 and Mr. Matthew S. McKenzie  
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7 Columbus, Ohio 43215

8 Porter, Wright, Morris & Arthur LLP  
9 By Mr. Daniel R. Conway  
10 41 South High Street  
11 Columbus, Ohio 43215

12 Ice Miller  
13 By Mr. Christopher Miller  
14 250 West Street  
15 Columbus, Ohio 43215

16 On behalf of the Ohio Power Company.

17 McNees, Wallace & Nurick LLC  
18 By Mr. Frank P. Darr  
19 Mr. Samuel C. Randazzo  
20 and Mr. Matthew R. Pritchard  
21 21 East State Street, 17th Floor  
22 Columbus, Ohio 43215

23 On behalf of the Industrial Energy Users  
24 of Ohio.

25 Vorys, Sater, Seymour & Pease, LLP  
By Mr. M. Howard Petricoff  
Ms. Gretchen Petrucci  
and Mr. Michael J. Settineri  
52 East Gay Street  
Columbus, Ohio 43215

On behalf of Retail Energy Supply  
Association, PJM Power Providers Group,  
Electric Power Supply Association,  
Constellation NewEnergy, Exelon  
Generation, LLC., and Dynegy, Inc.

## 1 APPEARANCES: (Continued)

2 Carpenter Lipps & Leland LLP  
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6 On behalf of EnerNOC, Inc.

7 Ohio Environmental Council  
8 By Mr. Trent A. Dougherty  
9 1145 Chesapeake Avenue, Suite I  
10 Columbus, Ohio 43212

11 On behalf of the Ohio Environmental  
12 Council and the Environmental Defense  
13 Fund.

14 Taft, Stettinius & Hollister LLP  
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17 Columbus, Ohio 43215

18 On behalf of The Kroger Company.

19 Ohio Partners for Affordable Energy  
20 By Ms. Colleen L. Mooney  
21 and Mr. David C. Rinebolt  
22 231 West Lima Street  
23 Findlay, Ohio 45840

24 On behalf of the Ohio Partners for  
25 Affordable Energy.

26 Carpenter Lipps & Leland LLP  
27 By Ms. Kimberly W. Bojko  
28 Ms. Danielle Ghiloni  
29 and Mr. Ryan P. O'Rourke  
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31 Columbus, Ohio 43215

32 On behalf of the Ohio Manufacturers'  
33 Association Energy Group.

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2 Sierra Club Environmental Law Program  
3 Ms. Kristin Henry  
4 and Mr. Tony Mendoza  
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6 San Francisco, California 94105  
7 Olson, Bzdok & Howard  
8 By Mr. Christopher M. Bzdok  
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10 Traverse City, Michigan 49686

11 Earthjustice  
12 By Mr. Shannon Fisk  
13 Northeast Office  
14 1617 John F. Kennedy Boulevard, Suite 1675  
15 Philadelphia, Pennsylvania 19103

16 On behalf of the Sierra Club.

17 Spilman, Thomas & Battle, PLLC  
18 By Mr. Derrick Price Williamson  
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20 Mechanicsburg, Pennsylvania 17050  
21 Spilman, Thomas & Battle, PLLC  
22 By Ms. Carrie Harris  
23 310 First Street, Suite 1100  
24 Roanoke, Virginia 24011

25 On behalf of Wal-Mart Stores East, LP,  
and Sam's East, Inc.

IGS Energy  
By Mr. Joseph Olikier  
6100 Emerald Parkway  
Dublin, Ohio 43016

On behalf of IGS Energy.

Boehm, Kurtz & Lowry  
By Mr. Michael L. Kurtz,  
Mr. Kurt J. Boehm  
and Ms. Jody Kyler Cohn  
36 East Seventh Street, Suite 1510  
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On behalf of the Ohio Energy Group.

1 APPEARANCES: (Continued)

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3 By Ms. Madeline Fleisher  
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6 Environmental Law & Policy Center  
7 By Mr. Justin M. Vickers  
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10 On behalf of the Environmental Law &  
11 Policy Center.

12 Ohio Poverty Law Center  
13 By Mr. Michael R. Smalz  
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15 Columbus, Ohio 43215

16 On behalf of the Appalachian Peace and  
17 Justice Network.

18 FirstEnergy Corp.  
19 By Mr. Mark Hayden  
20 and Mr. Scott J. Casto  
21 76 South Main Street  
22 Akron, Ohio 44308

23 Calfee, Halter & Griswold LLP  
24 By Mr. N. Trevor Alexander  
25 1200 Huntington Center  
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Columbus, Ohio 43215

On behalf of the FirstEnergy Solutions  
Corp.

Direct Energy  
By Ms. Jennifer L. Spinosi  
21 East State Street, 19th Floor  
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On behalf of Direct Energy Business, LLC,  
and Direct Energy Services, LLC.

## 1 APPEARANCES: (Continued)

2 Bruce J. Weston, Ohio Consumers' Counsel

3 By Mr. William J. Michael

4 Mr. Kevin F. Moore

5 and Ms. Jodi Bair,

6 Assistant Consumers' Counsel

7 10 West Broad Street, Suite 1800

8 Columbus, Ohio 43215-3485

9 Bricker &amp; Eckler, LLP

10 By Mr. Dane Stinson

11 100 South Third Street

12 Columbus, Ohio 43215-4291

13 On behalf of the Residential Consumers of  
14 the Ohio Power Company.

15 Mr. Richard L. Sites

16 155 East Broad Street

17 Columbus, Ohio 43215

18 Bricker &amp; Eckler, LLP

19 By Mr. Thomas J. O'Brien

20 100 South Third Street

21 Columbus, Ohio 43215-4291

22 On behalf of the Ohio Hospital  
23 Association.

24 Mike DeWine, Ohio Attorney General

25 By Mr. William L. Wright,

Section Chief

Mr. Steven L. Beeler

and Mr. Werner L. Margard, III,

Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 6th Floor

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On behalf of the Staff of the PUCO.

Ms. Evelyn R. Robinson

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Audubon, Pennsylvania 19403

On behalf of the PJM Interconnection.

1 APPEARANCES: (Continued)

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3 By Mr. Michael Austin  
4 41 South High Street, Suite 700  
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6 On behalf of Buckeye Power.

7 Dickson Wright PLLC  
8 By Mr. Terrence O'Donnell  
9 and Mr. Raymond D. Seiler  
10 150 East Gay Street, Suite 2400  
11 Columbus, Ohio 43215

12 On behalf of the Mid-Atlantic Renewable  
13 Energy Coalition.

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4431

1 Monday Morning Session,  
2 January 4, 2016.

3 - - -

4 EXAMINER PARROT: Let's go on the record.  
5 The Public Utilities Commission of Ohio has called  
6 for hearing at this time and place Case No.  
7 14-1693-EL-RDR, et al., in the Matter of the  
8 Application Seeking Approval of Ohio Power Company's  
9 Proposal to Enter into an Affiliate Power Purchase  
10 Agreement for Inclusion in the Power Purchase  
11 Agreement Rider. Good morning, everyone.

12 My name is Sarah Parrot. With me on the  
13 Bench is Greta See. We are the attorney -- excuse  
14 me, the attorney examiners assigned by the Commission  
15 to hear these cases. Also with us today is  
16 Commissioner Asim Haque. Commissioner Haque.

17 COMMISSIONER HAQUE: Good morning. I feel  
18 like I am testifying. This is a spot, I've sat in a  
19 few spots in this room but never this one. Look,  
20 these PPA cases carry with them the most gravity of  
21 any cases that I will get the opportunity to decide  
22 in my current term. Because of that it's my desire  
23 to be in the room. It's my desire to be in the room  
24 to hear testimony to understand your issues upon  
25 cross-examination. I grew up litigating and by being

1 here, in my mind, this will be a far less academic  
2 exercise than what Commissioners typically experience  
3 with a mountain of documents to review in order to  
4 make decisions.

5 At the same time, I don't want to be a  
6 distraction, so this is -- other than asking the  
7 attorney examiners who do a fantastic job running  
8 these hearings if I can use the restroom --

9 EXAMINER PARROT: Health break.

10 COMMISSIONER HAQUE: -- health break,  
11 sorry, or telling them I have to go pick up my kid  
12 from daycare, this will be the last you will hear  
13 from me. Of course, very interested in developing a  
14 very robust record for myself, Chairman Porter,  
15 Commissioner Trombold, Commissioner Slaby,  
16 Commissioner Johnson. And so, if there are issues  
17 that come up during the hearing that I think we need  
18 to address further, I will work with the attorney  
19 examiners to ensure that gets done.

20 That is it. I want to thank all of you  
21 for being here. These are, as you well know, these  
22 are extraordinarily important cases. Each one of you  
23 represents a particular interest that I think is --  
24 is, for lack of a better word, important, and so very  
25 grateful for your presence and looking forward to

1 sitting in on these proceedings. Thanks.

2 EXAMINER PARROT: Thank you, Commissioner  
3 Haque. All right. Let's get started with  
4 appearances. Let's begin with the Company.

5 MR. NOURSE: Thank you, your Honor. On  
6 behalf of the Ohio Power Company, Steven T. Nourse,  
7 Matthew J. Satterwhite, Matthew S. McKenzie, Daniel  
8 R. Conway, and Christopher L. Miller.

9 EXAMINER PARROT: On behalf of Industrial  
10 Energy Users-Ohio.

11 MR. DARR: Thank you, your Honor. On  
12 behalf IEU-Ohio, Sam Randazzo, Frank Darr, and Matt  
13 Pritchard, from the law firm of McNees, Wallace &  
14 Nurick, 21 East State Street, Columbus, Ohio.

15 EXAMINER PARROT: Sierra Club.

16 MR. MENDOZA: On behalf of Sierra Club,  
17 Tony Mendoza, Kristin Henry, and Shannon Fisk.

18 EXAMINER PARROT: Ohio Environmental  
19 Council and Environmental Defense Fund.

20 MR. DOUGHERTY: Your Honor, on behalf of  
21 the Ohio Environmental Council and EDF, Trent  
22 Dougherty.

23 EXAMINER PARROT: On behalf of Wal-Mart  
24 and Sam's.

25 MS. HARRIS: Carry Harris with the law

1 firm of Spilman, Thomas & Battle.

2 EXAMINER PARROT: Ohio Consumers' Counsel.

3 MR. MICHAEL: Good morning, your Honor.

4 On behalf of AEP Ohio's residential utility consumers  
5 the Office of the Ohio Consumers' Counsel, William J.  
6 Michael, Kevin Moore, Jodi Bair, and as outside  
7 counsel Dane Stinson from Bricker & Eckler.

8 EXAMINER PARROT: Ohio Energy Group.

9 MR. KURTZ: Good morning, your Honors.  
10 Michael Kurtz, Kurt Boehm, and Jody Kohn.

11 EXAMINER PARROT: The Kroger Company.

12 MR. YURICK: On behalf of the Kroger  
13 Company, Mark Yurick with the law firm of Taft,  
14 Stettinius & Hollister.

15 EXAMINER PARROT: On behalf of the PJM  
16 Market Monitor. All right. Let the record reflect  
17 counsel is not present for the Market Monitor this  
18 morning.

19 Mr. Petricoff, I guess I will let you  
20 introduce all of your many clients for us.

21 MR. PETRICOFF: I am going to defer to --

22 EXAMINER PARROT: Mr. Settineri.

23 MR. PETRICOFF: -- Mr. Settineri and he  
24 will give the --

25 EXAMINER PARROT: Okay.

1 MR. SETTINERI: On behalf of PJM Power  
2 Providers Group, the Electric Power Supply  
3 Association, Dynegy Inc., the Retail Energy Supply  
4 Association, Constellation NewEnergy Inc., Exelon  
5 Generation Company, M. Howard Petricoff, Michael  
6 Settineri, and Gretchen Petrucci, from the law firm  
7 of Vorys, Sater, Seymour & Pease.

8 EXAMINER PARROT: Thank you,  
9 Mr. Settineri.

10 Ohio Manufacturers' Association Energy  
11 Group.

12 MS. BOJKO: Thank you, your Honor. On  
13 behalf of OMAEG, Kimberly W. Bojko, Ryan P. O'Rourke,  
14 with the law firm of Carpenter Lipps and Leland.

15 EXAMINER PARROT: IGS.

16 MR. OLIKER: Good morning, your Honors.  
17 On behalf of IGS Energy, Joseph Oliker.

18 EXAMINER PARROT: The Mid-Atlantic  
19 Renewable Energy Coalition. All right. Let the  
20 record reflect counsel for MAREC is not present this  
21 morning.

22 FirstEnergy Solutions.

23 MR. ALEXANDER: Good morning, your Honor.  
24 On behalf of FirstEnergy Solutions, Trevor Alexander  
25 with the law firm of Calfee Halter & Griswold.

1 EXAMINER PARROT: Buckeye Power.

2 MR. MICHAEL: On behalf of Buckeye Power,  
3 Michael Austin with the law firm of Thompson Hine.

4 EXAMINER PARROT: Ohio Hospital  
5 Association.

6 MR. O'BRIEN: On behalf of the Ohio  
7 Hospital Association, Richard L. Sites and Tom  
8 O'Brien.

9 EXAMINER PARROT: The EPO. All right.  
10 Let the record reflect counsel for EPO is not present  
11 this morning.

12 The Direct Energy companies.

13 MS. SPINOSI: Good morning, your Honor.  
14 On behalf of Direct Energy Business, LLC, and Direct  
15 Energy Services, LLC, Jennifer L. Spinosi.

16 EXAMINER PARROT: Ohio Partners for  
17 Affordable Energy. All right. Let the record  
18 reflect counsel for OPAC is not present.

19 Appalachian Peace and Justice Network.

20 MR. SMALZ: Your Honor, on behalf of the  
21 Appalachian Peace and Justice Network, Michael R.  
22 Smalz, with the Ohio Poverty Law Center, 555 Buttles  
23 Avenue, Columbus, Ohio 43215.

24 EXAMINER PARROT: Environmental Law &  
25 Policy Center.

1 MS. FLEISHER: Good morning, your Honor.  
2 On behalf of the Environmental Law & Policy Center,  
3 Madeline Fleisher and Justin Vickers.

4 EXAMINER PARROT: EnerNOC. Let the record  
5 reflect counsel is not present this morning.

6 Mr. Settineri, did you enter an appearance  
7 of P3 and EPSA?

8 MR. SETTINERI: I believe I did. PJM  
9 Power Providers Electric Power Supply Association.

10 EXAMINER PARROT: Thank you.

11 And, finally, Commission staff.

12 MR. BEELER: On behalf of the staff of the  
13 Public Utilities Commission of Ohio, Ohio Attorney  
14 General Mike DeWine, Steven Beeler and Werner  
15 Margard.

16 EXAMINER PARROT: Thank you, Mr. Beeler.

17 Are there any preliminary matters that the  
18 parties wish to bring to the Bench's attention this  
19 morning?

20 MR. NOURSE: Your Honor, one preliminary  
21 matter was the intervention and testimony of PJM.  
22 And in order to go forward with the existing  
23 schedule, I guess I think that's the issue that needs  
24 to be addressed at the threshold.

25 EXAMINER PARROT: At this point we are

1 going to defer ruling on that for now, Mr. Nourse.  
2 Anything else?

3 MR. NOURSE: Well, I guess I assume you  
4 are going to deal with the motions for subpoenas --  
5 the motion to quash subpoenas. I think that's an  
6 important issue we wanted to be heard on as well.

7 EXAMINER PARROT: We can go ahead and hear  
8 arguments in response to the motions at this point if  
9 that's the parties' preference. I am not sure that  
10 would be the best one to -- I am just trying to think  
11 through the order of things and we also have a motion  
12 to compel and some other things, so I am just trying  
13 to think if there is any rhyme or reason in which we  
14 take these up this morning, but we can start with  
15 that one.

16 MR. NOURSE: Again, I just mention the two  
17 that affect the schedule and since we are proceeding  
18 this week and trying to confirm and finalize the  
19 schedule I think those two matters would affect the  
20 schedule. I am not going to, I guess unless you  
21 direct me otherwise, I wasn't planning on trying to  
22 incorporate any other witnesses other than the ones  
23 that have filed.

24 Obviously, we have a motion to strike in  
25 conjunction with the PJM intervention and, of course,

1 their late request for late filing of testimony and  
2 late intervention is pending, so I guess I view that  
3 as a threshold issue but, so that's the reason I  
4 wanted to address those two things.

5 As far as the motions to quash, you know,  
6 again, I think those are very important issues that  
7 would be a very bad precedent if parties to a  
8 stipulation were required to produce witnesses and  
9 respond to deposition notices merely because they  
10 sign a stipulation.

11 Obviously, the parties and the company  
12 have supported testimony and are prepared to  
13 obviously have Mr. Allen take the stand and answer  
14 any question about the -- about the stipulation. You  
15 know, I think subpoenas and forcible testimony should  
16 be limited to parties of factual knowledge that  
17 particular individuals may have that are relevant to  
18 the proceeding. I don't think that qualifies or  
19 encompasses any employee or an agent of a signatory  
20 party merely by the fact they signed the stipulation.

21 And I think there would be obviously, you  
22 know, I agree with the arguments that the Sierra Club  
23 put in their motion to quash relative to the chilling  
24 effect on the attorney-client privilege as well as  
25 the chilling effect on the settlement process if

1 parties will be able to, you know, sort of bully or  
2 try to, you know, force disclosure based on, you  
3 know, a sour grapes kind of theory, so I think that's  
4 inappropriate and should not be enforced by the Bench  
5 or by the Commission.

6           The three-part test that the Commission  
7 and the Supreme Court have approved for consideration  
8 of -- of contested stipulations does not incorporate  
9 anything like that and doesn't require anything like  
10 that. And so, you know, generally I just think it's  
11 a rabbit trail that should not be pursued and it  
12 would be inappropriate to force parties that are  
13 signing and supporting a stipulation to produce  
14 witnesses just -- just bear the burden, the expense,  
15 the additional litigation, cost and effort to do that  
16 as a punishment for supporting the stipulation.  
17 Thank you.

18           MR. MENDOZA: Your Honor, if I may? I  
19 just would like to add a little bit to what  
20 Mr. Nourse said. It is a little bit of a situation.  
21 Sierra Club did not intend to offer a witness to  
22 support the stipulation. We -- and OCC is asking to  
23 compel our witness to provide testimony on the  
24 stipulation. The problem is that Sierra Club's  
25 staff, the only information they have on the

1 stipulation is either information gained during  
2 settlement negotiations or in discussion with Sierra  
3 Club attorneys about the stipulation. There is no  
4 nonpublic relevant factual information that could  
5 come to light in the testimony of Sierra Club  
6 witness. It would be a waste of the Commission's  
7 time and it would be oppressive for Sierra Club to  
8 produce someone to testify on privileged matters  
9 essentially.

10 As far as Sierra Club and the one issue  
11 OCC has asked about is Sierra Club's rationale for  
12 entering into the stipulation. I think those types  
13 of issues are highly privileged. They go right to  
14 the attorney-client relationship. Decisions to enter  
15 a settlement obviously involve a lot of balancing a  
16 lot of factors.

17 And another issue that -- that OCC has  
18 asked about is Sierra Club's position on various  
19 parts of the stipulation. I think there is no point  
20 in having a witness testify on that type of issue.  
21 It's a legal matter. It's reflected in the  
22 stipulation itself. It's apparent on the face of the  
23 stipulation what Sierra Club's position is.

24 And I would like to add also that Sierra  
25 Club has a First Amendment right to engage in

1 political advocacy at -- free from, you know,  
2 unwarranted invasion of our privilege, essentially,  
3 and so we would ask that the motion to compel be  
4 denied and that our motion to quash be granted.

5 MR. OLIKER: Your Honor, if I can add to  
6 that further. If you look at the Commission rules,  
7 it says when there is a stipulation, one party must  
8 submit testimony. That's all it says. It doesn't  
9 say that every party has to. If you look at the  
10 document itself, it says you cannot look at any one  
11 individual provision and determine why any party  
12 would have signed. It's a packaged deal. Further  
13 explanation is not possible unless you examine all of  
14 the provisions of the stipulation and that is  
15 attorney-client privilege for why we might have said,  
16 okay, we are going to drop our litigation position to  
17 enter into this settlement package. You can't look  
18 further than that without revealing the  
19 attorney-client confidences.

20 MR. MICHAEL: If I could go ahead and  
21 respond now, your Honors?

22 EXAMINER PARROT: Just a moment,  
23 Mr. Michael.

24 Ms. Spinosi, before we proceed in the  
25 other side of things, did you wish to add anything?

1 MS. SPINOSI: Sure. I mean, I think that  
2 Direct Energy is in the same position as IGS and  
3 Sierra Club in terms of the issues that OCC is  
4 requesting information about. The one thing that is  
5 distinct from our company's position is that we did  
6 not previously offer witness testimony, but we made  
7 it clear to OCC, following their request for a  
8 deposition, that we did not intend to proffer a  
9 witness for testimony. And, similarly, you know,  
10 Direct Energy does not feel we should be compelled to  
11 produce a witness to testify regarding, you know, our  
12 position on various issues within the stipulation or  
13 our rationale for its support. Thank you.

14 EXAMINER PARROT: Mr. Michael.

15 MR. MICHAEL: Thank you, your Honor. In  
16 the event that your Honors' schedule did not permit  
17 them to review the docket this morning, OCC did file  
18 a memoranda contra and OCC would obviously request  
19 that your Honors analyze that document before making  
20 a ruling. And I am not going to rehash the arguments  
21 that were made in that memorandum contra. I will  
22 reiterate them by reference and suggest to your  
23 Honors that the reasons stated in the memorandum  
24 contra are more than adequate to granting our  
25 subpoenas and requiring the subpoenaed parties to

1 produce a witness.

2 I did want to take a little time, however,  
3 to address some of the arguments that were made  
4 orally here. The first argument made by the parties  
5 regarding the fact that AEP Ohio is putting on  
6 Mr. Allen to support the stipulation, it would be  
7 important, I think, for your Honors to note that  
8 Mr. Allen, in responses to OCC discovery requests,  
9 specifically referred OCC to the other parties and  
10 indicated that the other parties could speak for  
11 themselves and that AEP would not, could not, answer  
12 on behalf of the other parties.

13 Further, regarding the broad assertions of  
14 confidentiality, to the degree it needs affirming,  
15 OCC has no interest in invading the attorney-client  
16 privilege. However, there is no blanket privilege as  
17 demonstrated by the fact that Mr. Allen is  
18 testifying. If there were some sort of blanket  
19 privilege to -- that would prohibit nonsignatory  
20 parties from bringing signatory parties in to answer  
21 questions about a stipulation they signed, Mr. Allen  
22 would not be able to testify. These are all  
23 signatory parties. They signed the stipulation. We  
24 have questions to ask them about the stipulation that  
25 they signed.

1           And, further, as your Honors are well  
2     aware, the Ohio Supreme Court has outright rejected  
3     any sort of broad, quote-unquote, settlement  
4     privilege. And to accept AEP Ohio's and IGS, Sierra  
5     Club, and Direct Energy's arguments would resurrect a  
6     broad settlement privilege contrary to the Ohio  
7     Supreme Court's decision in the OCC versus PUCO case  
8     that is cited in our memorandum contra.

9           I think it's important for your Honors to  
10    keep in mind that the parties that are opposing our  
11    ability to cross-examine witnesses on the stand are  
12    trying to stop the process before it even starts. We  
13    haven't asked a single question. Yet, during  
14    deposition, because they didn't show up for that,  
15    they haven't been on the stand yet.

16           The best they can do is refer your Honors  
17    to some written discovery. Discovery tools are not  
18    mutually exclusive. They have no idea that -- the  
19    nature of the questions that we are going to ask at  
20    the deposition other than the questions that we  
21    shared in the memorandum contra, the topics we shared  
22    in the memorandum contra.

23           So I think it's important to keep in mind  
24    for your Honors that they are trying to stop the  
25    process before it even starts. If they want to

1 submit to cross-examination and object at the time,  
2 that's certainly their right to do so. OCC will  
3 defend its questions at that time, but to stop the  
4 process short is contrary to the very robust record  
5 that it is my understanding the Commission would like  
6 to hear on these cases of the most gravity.

7 Your Honor, there is also some serious  
8 questions about the meaning of the document. I  
9 shared with Sierra Club's counsel and we shared in  
10 our memorandum contra and I shared with AEP Ohio's  
11 counsel that the stipulation is vague and ambiguous.  
12 The stipulation, as a settlement agreement, is a  
13 contract like any other. And given a vague and  
14 ambiguous contract, questions about the meaning of  
15 the document are completely and utterly appropriate.

16 And I can give your Honors a couple of  
17 concrete examples if I might very quickly. When I  
18 had the good fortune of trying to resolve the  
19 discovery dispute with Ms. Henry, she indicated to me  
20 that it is Sierra Club's overall position as a matter  
21 of policy that when they enter into a stipulation,  
22 they don't -- they not oppose the stipulation. And I  
23 shared with Ms. Henry that the text of the  
24 stipulation is not consistent with what she asserted  
25 was Sierra Club's general policy. So there is one

1 instance of vagary.

2 Further on that same subject matter during  
3 Mr. Allen's deposition he asserted during the  
4 deposition that Sierra Club supports the stipulation  
5 as a whole and not oppose and support are vastly  
6 different subject matters and at the very least  
7 warrants some questions at a deposition and  
8 cross-examination during a hearing of this matter.

9 Further, during Mr. Allen's deposition, I  
10 questioned him about an interrogatory response where  
11 OCC inquired about the meaning of "not oppose" and  
12 the meaning of "not participating in." The  
13 interrogatory gave a general response. And during  
14 his answer, Mr. Allen clarified that that was a  
15 general response and when used in any specific  
16 document you had to look about how those terms were  
17 used in the specific document and the intent of the  
18 parties using them that in and of itself creates  
19 vagary and warrants further discussion and  
20 questioning about nonsignatory parties of those  
21 parties that drop footnotes with respect to various  
22 provisions in the stipulation.

23 And that is why OCC sought to depose IGS,  
24 Direct Energy, and Sierra Club, and that is why we  
25 have asked them to appear at the hearing so we could

1 ask questions about the meaning of the vague and  
2 ambiguous stipulation and in particular the footnotes  
3 that they included in the stipulation.

4           Lastly, your Honor, and I appreciate your  
5 Honor's time to explain OCC's position, Mr. Olier  
6 asserted correctly that in the OAC, a party is -- at  
7 least one party is required to support a stipulation;  
8 however, nothing in the OAC or the statutes prevent  
9 or prohibit from taking the deposition, obtaining  
10 discovery, or subpoenaing other signatory parties to  
11 appear at the hearing to answer questions about the  
12 stipulation that they signed.

13           So, in conclusion, your Honor, I would  
14 first urge your Honor, if possible, to consider the  
15 memorandum contra, the arguments therein, the matters  
16 I have addressed here today, and just recall, your  
17 Honors, that from OCC's perspective and from the  
18 consumers' perspective that we represent, this is a  
19 \$2 billion case.

20           It is a case of the most gravity and I  
21 think the Commission would benefit from a very robust  
22 record. So we would request that your Honors not  
23 stop the process short, require the parties to appear  
24 at deposition, the parties to appear at the hearing  
25 for cross-examination; therefore, deny the motions to

1 quash. Thank you.

2 MR. NOURSE: Your Honor, if I could,  
3 briefly.

4 EXAMINER PARROT: Ms. Bojko.

5 MS. BOJKO: He might want me to respond  
6 first. Thank you. Just briefly, OMAEG supports  
7 discovery rights afforded to all parties under Ohio  
8 law. OMA specifically addressed one issue that was  
9 in all three motions to quash that, to me, is  
10 problematic. All three motions claim that the  
11 subpoena was somehow executed improperly because it  
12 was not signed by an Attorney Examiner that's sitting  
13 or established to be the examiners in the case. And  
14 that is just completely not consistent with the  
15 Commission's rules, 4901:1-25(A)(1) or (2), as  
16 indicated in the motions, they both allow a subpoena  
17 to be signed by a designee in the legal department.

18 And clearly given the holiday schedule,  
19 that is probably what happened in this case, one of  
20 the two presiding examiners were not present, and  
21 that another attorney examiner was designated as the  
22 person to sign subpoenas or handle matters in the  
23 absence of certain examiners. So I just wanted to  
24 briefly explain that and also to express our  
25 opposition to such a claim that is contained in the

1 motions. Thank you.

2 MR. MICHAEL: Your Honor, just real  
3 quickly, if we could address that. In the memoranda  
4 contra we did address the subject matter that  
5 Ms. Bojko raised. Ms. Bair submitted an affidavit  
6 attached to the memoranda contra, confirming that the  
7 governing provisions of the OAC were in fact  
8 followed. Thank you.

9 MR. SMALZ: And, your Honor, AP JN would  
10 strongly concur with the arguments that were just  
11 made by Consumers' Counsel and OMAEG and would  
12 further reinforce the point made by Consumers'  
13 Counsel that the stipulation contained some vague and  
14 ambiguous, not clearly understandable provisions.

15 It's clear, however, that some of the  
16 signatory parties signed on to the stipulation  
17 because of concessions made to those particular  
18 parties and their particular arguably narrow  
19 interest.

20 And in order to properly assess the  
21 stipulation, to determine whether it's in the public  
22 interest, whether there was serious bargaining among  
23 the parties and, most importantly, simply did it  
24 determine the meaning of the stipulation in light of  
25 the fact that the -- Mr. Allen, the sole supportive

1 witness, made it clear in his deposition that he is  
2 either unwilling or unable to testify about the  
3 rationale behind some of these particular concessions  
4 made to other signatory parties, that it's important  
5 to have testimony from some of those signatory  
6 parties in order to have a complete record and a full  
7 understanding of the meaning and impact of this  
8 stipulation.

9 MR. NOURSE: Okay. Your Honor, if I  
10 could, you know, I think it's clear under the  
11 Commission's rule and under the three-part test that  
12 there is no basis to require an additional witness or  
13 to require every signatory party that signs a  
14 stipulation to produce a witness or be compelled to  
15 provide testimony.

16 Again, doing so would not only disregard  
17 the three-part test and have a chilling effect on  
18 settlement and also obviously the adverse impact on  
19 the attorney-client privilege that's been discussed.  
20 You know, just because someone asks a question about  
21 the stipulation doesn't mean that it's a critical  
22 question. It's an important question or it's a  
23 relevant question.

24 And I think the example that was mentioned  
25 earlier about discovery and saying that the company

1 deferred to other parties as to the meaning of -- as  
2 to -- we don't speak for them and they would have to  
3 speak for themselves, that was an alternative. It  
4 wasn't the main answer to that question. There is an  
5 objection. Counsel also participated in those  
6 questions.

7 And, you know, so it's just like at the  
8 legislature, if you want to ask an individual  
9 legislator what a piece of law means, you might get  
10 different answers, but it really doesn't matter  
11 because what the law says and the words that are used  
12 in the law are what it means. So even though the  
13 Governor may sign a law, he is not going to try to  
14 say what an individual legislator was thinking or was  
15 thinking about the intent of the law.

16 Here, we have language that we are  
17 perfectly willing and all the signatory parties are  
18 willing to allow Mr. Allen to explain and defend. He  
19 would do so to the full extent that we believe is  
20 appropriate. We would take the risk that if there is  
21 something that's a fatal flaw, there is something  
22 that's, you know, an important ambiguity or something  
23 that the Commission would believe under the  
24 three-part test is a fatal flaw or a problem that  
25 would require rejection of the stipulation, that's

1 the risk that the parties supporting the stipulation  
2 would take. And we are willing to take that risk  
3 with Mr. Allen's testimony.

4 So, you know, the idea that the opposing  
5 parties want to get into the nuances of supporting  
6 and not opposing and what footnotes mean and all that  
7 kind of stuff, you know, it speaks for itself and  
8 there is no -- there is no -- they've made no  
9 justification of why these questions need to be  
10 addressed and why they need to be, you know, haul  
11 people into the Commission hearing process, you know,  
12 against -- involuntarily require people to attend to  
13 answer these questions.

14 As far as the other issue about who signed  
15 the subpoena, I don't think that matters either. The  
16 standard is whether the motion to quash should be  
17 granted, so the subpoenas were signed and that's  
18 fine. But that's the whole point of a motion to  
19 quash and that's the reason that subpoenas are  
20 typically signed as an administrative matter and  
21 without great deliberation and determination whether  
22 something is appropriate. So the motion to quash is  
23 the appropriate procedure and the standard for the  
24 motion to quash is what should determine your -- your  
25 ruling.

1           And, you know, again, I would say OCC has  
2 not made any claim that there is unique factual  
3 knowledge that's relevant and probative of the  
4 three-part test that would justify forcing these  
5 external persons to come in and testify in the  
6 Commission process. Thank you.

7           MR. MENDOZA: Your Honor, if I may  
8 briefly? I just would like to respond to two things  
9 Mr. Michael said. Sierra Club is not blocking the  
10 discovery process. We responded -- OCC, in its  
11 written discovery, asked a handful of questions that  
12 sought relevant, factual information and we responded  
13 to those. We provided them a contract we executed  
14 with AEP Generation Resources. We also responded to  
15 a question about whether we had performed any rate  
16 analysis on the rate impact of the stipulation which  
17 is relevant, factual information.

18           We did not respond to all the questions  
19 that sought our attorney-client communications or our  
20 legal positions in this case. So, just to be clear,  
21 we are not opposed to broad discovery. We are  
22 opposed to discovery that seeks to peek inside the  
23 attorney-client relationship.

24           And then the second point, there continues  
25 to be confusion about Sierra Club's position and the

1 need to ask one of our employees about what Sierra  
2 Club's position is. Sierra Club's lawyers will be  
3 informing the Commission of what our position is. We  
4 did so in the stipulation. In case there is still  
5 confusion about it, Sierra Club does not oppose the  
6 stipulation. That is our position. And with that, I  
7 ask that the -- our motion to quash be granted.

8 MR. OLIKER: Your Honor, just briefly. I  
9 would echo many of the points made by Mr. Nourse and  
10 Mr. Mendoza. Additionally, I just want to get back  
11 to the point. We keep hearing request for parties'  
12 rationales. The rationales for signing this  
13 stipulation. That's not what the three-part test is  
14 about. It's about whether there was knowledgeable  
15 bargaining in that process and whether the parties  
16 were capable. And whether or not it violates policy  
17 and what it's in the public interest. That's the  
18 three-prong test. It doesn't get to the rationale  
19 why every single party may have or may not have done  
20 something in the stipulation.

21 And regarding the Supreme Court case that  
22 was referenced, that was about undisclosed side  
23 deals. There is no case where there is a side deal  
24 in this case that has not been disclosed. This is  
25 simply not applicable to this proceeding.

1           Parties here have been willing to give  
2     factual evidence. Similar to, as Sierra Club did,  
3     IGS notified OCC in discovery that the requested  
4     analysis that it sought had not been done. If it was  
5     a question regarding factual issues like that, we  
6     provided it.

7           We are not going to provide  
8     attorney-client privilege regarding our internal  
9     business, you know, rationale, based on  
10    attorney-client advice for why we may or may not have  
11    done something. It's simply off limits in this case  
12    under the Rules of Evidence.

13           MR. MICHAEL: Your Honor, since it was  
14    OCC's subpoena, I would like to take the opportunity  
15    to respond a little bit. This rationale argument is  
16    a strawman. I don't recall in my remarks referencing  
17    the rationale at all. Mr. Nourse indicated that OCC  
18    needed to show that the discovery sought was  
19    important and relevant.

20           I give specific examples in the memorandum  
21    contra and I referenced two instances of the vagary  
22    in the stipulation based on AEP's Ohio own testimony  
23    and responses to discovery. We don't have to  
24    disclose, at this point in time, each and every  
25    reason why we have important relevant questions, but

1 we did list a number of concepts in the memorandum  
2 contra, and I raised two in my oral remarks.

3 Mr. Nourse referenced an objection to the  
4 interrogatory that I raised in my opening remarks.  
5 What he didn't point out is that in a prior  
6 interrogatory, the witness that answered the  
7 interrogatories adopted the response to the  
8 interrogatory in her question as his own and,  
9 therefore, the fact that there was an objection is of  
10 no moment.

11 Your Honor, there was a comment by  
12 Mr. Nourse about how the document speaks for itself.  
13 The document does not and cannot speak for itself as  
14 an inanimate object, and it's vague and ambiguous, as  
15 not only OCC has maintained but also other opposing  
16 parties have made clear in question with their  
17 remarks here today.

18 Regarding a comment by Sierra Club, they  
19 keep on referencing the fact that they responded to  
20 questions in writing. Discovery is not mutually  
21 exclusive. You don't get to do writing or a  
22 deposition. You get to do both so long as they seek  
23 relevant and important information. And as I have  
24 asserted here and also in the memorandum contra, we  
25 seek relevant, important information. So the fact

1 they responded to some written discovery doesn't  
2 preclude OCC from, A, taking the depositions, and, B,  
3 cross-examining them during the hearing.

4 And as I have tried to make clear here  
5 today and also in the memorandum contra, what we  
6 expect to ask them questions about is in no way,  
7 shape, or form limited to what we tried to take  
8 written discovery on.

9 Real quickly on the Supreme Court case  
10 referenced, and Mr. Olikier taking issue with my  
11 characterization of that case, that case stood for  
12 the broad principle that there is no settlement  
13 privilege. Whether that has to do with side deals or  
14 questions about the meaning of a vague and ambiguous  
15 document, there is no blanket settlement privilege  
16 that Ohio recognizes, and were the Commission to  
17 quash the subpoenas, that's, in effect, what would  
18 happen.

19 EXAMINER PARROT: Anything else,  
20 Mr. Michael?

21 MR. MICHAEL: Yeah. Just thank you, your  
22 Honor, for asking. Just one quick last point. Were  
23 your Honors to take the opportunity to look at the  
24 footnotes that IGS, Sierra Club, and Direct Energy  
25 participated in, your Honors would probably take note

1     that there are footnotes associated with assertions  
2     in the stipulation with respect to the three-prong  
3     test, and they either don't oppose it, they are not  
4     participating in them, or both.

5             So there are -- there is relevant factual  
6     information out there, we think, germane to the  
7     three-part test, particularly in light of the  
8     ambiguity. So, once again, we would simply request  
9     that your Honors deny the motion to quash, require  
10    the parties to appear at deposition and also at the  
11    hearing for cross-examination.

12            EXAMINER PARROT: Thank you, Mr. Michael.

13            MR. MICHAEL: Thank you, your Honor.

14            EXAMINER PARROT: Mr. Michael, I do agree  
15    with you that there are two different issues here,  
16    that the discovery issue and the taking of  
17    depositions is different. There are different  
18    standards there than there are with respect to the  
19    offering of testimony at the hearing itself.

20            With respect to that latter issue and the  
21    motion to quash, we are going to defer our ruling on  
22    those motions at this point and take that up down the  
23    road a bit. Recognizing, Mr. Nourse, as you pointed  
24    out, though, this does affect the schedule, so we  
25    won't sit on it for too long, I promise you that.

1           But with respect to the motion to compel,  
2     we are going to grant your motion, OCC, on that  
3     request to take depositions of an individual from  
4     both Sierra Club, IGS, and Direct Energy. We are  
5     going to direct those three parties to produce an  
6     individual for a deposition. I will leave it to all  
7     of you to work out the time and place for that, but  
8     we are going to impose a quick deadline here and  
9     expect those occur, if not later this afternoon, by  
10    tomorrow.

11           MR. MICHAEL: Thank you, your Honor.

12           EXAMINER PARROT: Any other preliminary  
13    matters?

14           MR. OLIKER: Your Honor, that may,  
15    depending on the order of witnesses, that may present  
16    some difficulty for IGS. As you know, according to  
17    the Commission's rules, if a party cannot obtain  
18    counsel to represent them, then the deposition is of  
19    no value and cannot be offered into evidence. I am  
20    the only counsel for my company and I may need to be  
21    here depending on the witnesses that are presented,  
22    so I may need a tad bit of flexibility.

23           EXAMINER PARROT: Well, I will just point  
24    out, Mr. Olikier, that the depositions were noticed to  
25    occur last week before this hearing started, and I

1 think it may have been in your best interest to have  
2 thought about this maybe before we were in this  
3 position of having to schedule depositions while the  
4 hearing is now in session.

5 So I will just ask if you do have that  
6 sort of issue, you bring it to our attention as soon  
7 as possible and we will work with you and OCC to see  
8 what we can work out, but it is the Bench's ruling  
9 that these depositions happen in expeditious fashion.  
10 All right? Anything else on that?

11 Any other preliminary matters, Ms. Bojko?

12 MS. BOJKO: Thank you, your Honor. At  
13 this time, your Honor, the Ohio Manufacturers'  
14 Association Energy Group would like to note its  
15 continuing objection to the procedural schedule  
16 established in this proceeding and we would like to  
17 renew our previously-offered motion for a continuance  
18 in this case, including the latest phase of this  
19 proceeding of holding a hearing on a stipulation that  
20 was filed a little over a week before the holidays,  
21 with a discovery cutoff date on Christmas eve, the  
22 deadline for filing expert testimony in opposition on  
23 the first business day after the holiday, and the  
24 commencement of the hearing on the first business day  
25 after another holiday.

1           The December 14 stipulation raises several  
2   new issues that were not in their original  
3   application or were not addressed at the initial  
4   hearing. Given the new issues raised in the  
5   stipulation during the Holiday season, 11 parties  
6   filed or supported a motion for an extension of the  
7   procedural schedule on December 16, 2015, requesting  
8   a modest three-week extension in order to provide the  
9   intervenors who opposed the stipulation adequate time  
10   to review the stipulation and the supporting  
11   testimony, to conduct discovery, engage expert  
12   witnesses over the holidays, prepare testimony and  
13   prepare for a hearing.

14           To date, the motion has not yet been ruled  
15   upon. Pursuant to Ohio Revised Code 4903.082 and  
16   OAC 4901-1-16, all parties and intervenors must be  
17   granted ample rights of discovery and allowed  
18   thorough and adequate preparation in participation in  
19   Commission proceedings.

20           The holidays, abbreviated preparation  
21   time, and overlapping depositions and deadlines with  
22   the FirstEnergy ESP proceeding clearly do not allow  
23   for the thorough and adequate preparation of this  
24   proceeding afforded by law, and is both unjust and  
25   prejudicial to the nonsignatory intervening parties

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**Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM**

Summary: Motion to Quash Subpoenas Served by Ohio Consumers Counsel and Motion IN LIMINE to Preclude Hearing Testimony from the Subpoenaed Witnesses electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company