BOEHM, KURTZ & LOWRY
ATTORNEYS AT LAW
36 EAST SEVENTH STREET
SUITE 1510
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255
TELECOPIER (513) 421-2764

Via E-file

June 22, 2016

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 10-2929-EL-UNC
Case No. 11-346-EL-SSO
Case No. 11-348-EL-SSO
Case No. 11-349-EL-AAM
Case No. 11-350-EL-AAM
Case No. 14-1186-EL-RDR
Case No. 13-1892-EL-FAC

Dear Sir/Madam:

Please find attached the MEMORANDUM CONTRA MOTION FOR A CONSOLIDATED RESOLUTION OF MULTIPLE PROCEEDINGS AND MOTION TO STRIKE BY THE OHIO ENERGY GROUP AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL for filing in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Encl.
Cc: Maureen R. Willis, Esq., Office of the Ohio Consumers' Counsel
Certificate of Service

BEFORE THE

PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	:	**Case No. 10-2929-EL-UNC**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	:	**Case No. 11-346-EL-SSO** **Case No. 11-348-EL-SSO**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	:	**Case No. 11-349-EL-AAM** **Case No. 11-350-EL-AAM**
In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider.	:	**Case No. 14-1186-EL-RDR**
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company.	:	**Case No. 13-1892-EL-FAC**

MEMORANDUM CONTRA
MOTION FOR A CONSOLIDATED RESOLUTION OF MULTIPLE PROCEEDINGS AND MOTION TO STRIKE BY THE OHIO ENERGY GROUP AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

To protect consumers from paying unjust and unreasonable rates, the Ohio Energy Group ("OEG") and the Office of the Ohio Consumers' Counsel (collectively, "Joint Movants") submit this Memorandum Contra the Motion for a Consolidated Resolution of Multiple Proceedings ("AEP Ohio Motion") filed by Ohio Power Company ("AEP Ohio," "Company," or "Utility") in the above-captioned dockets on June 7, 2016.[1] Additionally, Joint Movants move to strike portions of the Direct Testimony of William A. Allen ("Allen Testimony") filed therewith. As discussed further in the attached Memorandum in Support, while AEP Ohio's proposal to

[1] Ohio Adm. Code 4901-1-12.

consolidate multiple proceedings is not unreasonable, the PUCO should reject the Utility's proposed procedural schedule as well as its suggested resolution of these proceedings.

According to AEP Ohio's own filing, customers already paid $327 million in Retail Stability Rider ("RSR") charges that the Court recently determined were unlawful and should be used to offset current RSR charges.[2] However, AEP Ohio seeks to extract $470 million more from customers, a resolution which it can only reach by going back in time (August 2012 through May 2015) and recalculating its capacity costs to adjust future rates. Ohio law does not allow such retroactive ratemaking.

AEP Ohio customers should no longer be billed $4/MWh in RSR charges. If the Company's unlawful $470 million retroactive ratemaking proposal is rejected, and the $327 million RSR overcharge already paid by customers is used to offset the remaining RSR balance, then customers would owe no more to AEP Ohio. And all RSR charges collected after June 1, 2016 (when the Commission made the charges subject to refund) should be returned to customers. This is the resolution the Supreme Court of Ohio ordered when it directed the PUCO to *"adjust the balance of the deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP."*[3]

Consequently, the PUCO should strike the following portions of the Allen Testimony, which relate to AEP's unlawful retroactive ratemaking proposal:

- Page 3, lines 14 (starting with "(5)") through 19 (ending with "and");
- Page 4, lines 1-8;
- Page 14, line 6 through Page 15, line 10;
- Page 16, lines 6-14 (ending with "$24.7/MWh");
- Page 16, line 15 (staring with "For the") through Page 17, line 2;
- Page 17, lines 12-21;
- Page 20, line 15 through Page 21, line 23;
- Page 23, lines 7 through 11 (ending with "and");
- Exhibits WAA-REM1, WAA-REM2, WAA-REM3, WAA-REM4, and WAA-REM5.

[2] Exhibit WAA-REM4.
[3] *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

That proposal is barred by the Supreme Court of Ohio's prohibition on retroactive ratemaking,[4] relies upon improper *"after-the-fact"* evidence, exceeds the scope of the Court's instruction on remand, and is inconsistent with principles of consistency and equity. The Commission should also expressly state that the scope of any hearing in these proceedings will not include any evidence related to retroactively increasing AEP Ohio's FRR capacity deferral.

Respectfully submitted,

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

Bruce J. Weston
OHIO CONSUMERS' COUNSEL

Maureen R. Willis, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9567 – Willis
(614) 466-7964 – Etter
Maureen.willis@occ.ohio.gov
Terry.etter@occ.ohio.gov

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

[4] *Keco Industries, Inc. v. Cinci. & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957) ("*Keco*").

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	:	**Case No. 10-2929-EL-UNC**
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In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider.	:	**Case No. 14-1186-EL-RDR**
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company.	:	**Case No. 13-1892-EL-FAC**

MEMORANDUM IN SUPPORT

The PUCO should take caution in responding to AEP Ohio's ambitious, but unlawful request in this proceeding. As an initial matter, Joint Movants have no objection to AEP Ohio's request that the PUCO consolidate and resolve all of the above-captioned proceedings simultaneously. But the extremely expedited schedule proposed would prejudice customers and undermine the PUCO's opportunity to give full and proper consideration to the matters at issue.

As AEP Ohio was likely aware at the time of filing its Motion, the procedural schedule in the FirstEnergy ESP case (a major case in which many of the same intervening parties are participating) currently requires that intervenor testimony be filed June 22, 2016 and that an evidentiary hearing commence on July 11, 2016. Yet AEP Ohio seeks to require intervenor testimony to be filed in these proceedings on July 8, 2016 with a hearing to begin on July 27, 2016. Such a schedule would create an unreasonable and unnecessary overlap in major cases, undercutting the opportunity for intervening parties to present well-prepared and comprehensive evidence in these

proceedings. Adopting such an expedited schedule would also force the PUCO to consider a host of issues related to both FirstEnergy and AEP Ohio at the same time. Accordingly, the PUCO should adopt a more reasonable procedural schedule to consider the issues presented in these proceedings. Such a schedule would require Staff/Intervenor Testimony no earlier than August 22, 2016 and would establish a hearing no earlier than September 5, 2016. The Commission should also expressly state that the scope of any hearing in these proceedings will not include any evidence related to retroactively increasing AEP Ohio's FRR capacity deferral.

Additionally, the Commission should strike the following portions of the Allen Testimony:

- Page 3, lines 14 (starting with "(5)") through 19 (ending with "and");
- Page 4, lines 1-8;
- Page 14, line 6 through Page 15, line 10;
- Page 16, lines 6-14 (ending with "$24.7/MWh");
- Page 16, line 15 (staring with "For the") through Page 17, line 2;
- Page 17, lines 12-21;
- Page 20, line 15 through Page 21, line 23;
- Page 23, lines 7 through 11 (ending with "and");
- Exhibits WAA-REM1, WAA-REM2, WAA-REM3, WAA-REM4, and WAA-REM5.

As discussed below, the proposal set forth in these portions of the Allen Testimony is barred by the Supreme Court of Ohio's prohibition on retroactive ratemaking, relies upon improper *"after-the-fact"* evidence, exceeds the scope of the Court's instruction on remand, and is inconsistent with principles of consistency and equity.

I. AEP Ohio's Request to Retroactively Increase Its FRR Capacity Rate Would Harm Customers and Is Barred By the Supreme Court of Ohio's Prohibition Against Retroactive Ratemaking.

In the Allen Testimony, AEP Ohio proposes to retroactively increase by $470 million (plus $17.8 million in associated interest) the FRR capacity rate lawfully applied from August 8, 2012 through May 31, 2015.[5] Consideration of such a proposal would be a waste of administrative resources for both the parties and the PUCO because AEP Ohio's proposal is plainly barred by the Supreme Court's prohibition on retroactive ratemaking.

[5] Allen Testimony at 12, line 12.

On July 2, 2012, under R.C. 4905.04, 4905.05, and 4905.06, the PUCO adopted a *"state compensation mechanism"* for AEP Ohio in order to compensate it for the costs it incurred to provide FRR capacity service.[6] That state compensation mechanism consisted of two parts. First, using traditional cost-of-service principles, the PUCO determined that AEP Ohio's cost of providing FRR capacity service was $188.88/MW-day.[7] Second, the PUCO allowed AEP Ohio to charge CRES providers the prevailing PJM RPM market rates from August 8, 2012 through May 31, 2015 and to defer the difference between its cost-based $188.88/MW-day FRR capacity rate and market prices during that period.[8] The PUCO expressly stated that the state compensation mechanism, including the $188.88/MW-day FRR capacity rate, would *"remain in effect until AEP-Ohio's transition to full participation in the RPM market is complete and the Company is no longer subject to its FRR capacity obligations."*[9] AEP Ohio's last day as an FRR Entity was May 31, 2015. Its final deferral balance was therefore set as of that date. Yet AEP Ohio now seeks to retroactively change the PUCO-approved $188.88/MW-day FRR capacity rate to $288.83/MW-day and to increase its final deferral balance as of May 31, 2015 by $470 million.

In *Keco,* the Court held that *"...the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that* ***any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court;*** *and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases."*[10] Notably, the Court did not order a remand to address the energy credit used in the calculation of that FRR capacity rate until April 21, 2016.[11] Hence, in accordance with *Keco,* the FRR capacity rate was lawful from August 8, 2012 when it was established through May 31, 2015, when it expired. AEP Ohio cannot now go back and recalculate the rate that it believes should have been in effect and collect that money from customers in future rates. AEP Ohio's proposal in this case fits the classic definition of retroactive ratemaking.

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[6] Opinion and Order, Case No. 10-2929-EL-UNC (July 2, 2012) ("Capacity Case Order").
[7] Capacity Case Order at 33.
[8] Capacity Case Order at 23-24.
[9] Capacity Case Order at 24.
[10] *Keco*, 166 Ohio St. at 259 (emphasis added).
[11] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607.

A litany of Ohio Supreme Court case law supports the prohibition against retroactive ratemaking first set forth in *Keco*.[12] Repeatedly, the Supreme Court has held firm to the principle that regardless of the harm or benefit to either customers or the utility, lawfully-established filed rates cannot be changed retroactively. Instead, rates must be changed prospectively only through a new Order of the Commission. In *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, the Court held:

> *...the statutes make clear that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that* ***the schedule remains in effect until replaced by a further order of the commission; that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order****. This holding is consistent with the basis of this court's jurisdiction, with precedent and established practice, and with the statutory framework for public utility ratemaking.*[13]

Subsequently, in *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio*, the Court explained that:

> *...utility ratemaking by the Public Utilities Commission is prospective only. The General Assembly has attempted to balance the equities by* ***prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeals,*** *while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal. In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.*[14]

In 2011, the Supreme Court stated that:

> *A rate increase making up for revenues lost due to regulatory delay is precisely the action that we found contrary to law in* Keco. *"[A] utility may not charge increased rates during proceedings before the commission seeking same[,] and losses sustained thereby"—that is, while the case is pending—"may not be recouped."*[15]

Keco's prohibition on retroactive ratemaking has been applied both to rates adopted under the provisions of S.B. 221 and to rates adopted under the PUCO's traditional cost-of-service statutes, including the statutes cited

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[12] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863; *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio*, 80 Ohio St. 3d 344, 686 N.E.2d 501 (1997); *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655; *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E. 2d 853.

[13] *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n*, 46 Ohio St. 2d 105, 116-17, 346 N.E.2d 778, 786 (1976) (emphasis added).

[14] *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio*, 80 Ohio St. 3d 344, 348, 686 N.E.2d 501, 504 (1997) (emphasis added).

[15] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶ 11.

by the PUCO when it adopted AEP Ohio's $188.88/MW-day FRR capacity rate. This is the law of the land unless and until there is a legislative change or the Ohio Supreme Court decides to reverse *Keco*.

The PUCO itself has adhered to the prohibition against retroactive ratemaking set forth in *Keco* on multiple instances.[16] And with respect to applying the *Keco* doctrine to utilities, the Commission explained that:

> *The Supreme Court of Ohio has ruled that the difference between rates established pursuant to a remand upon reversal of a Commission order and the higher rates collected during the consideration of the appeal from that order is not recoverable in an action by a consumer. Keco Industries, Inc. et al. v. The Cincinnati & Suburban Bell Telephone Co., 166 OS 254, 141 NE2d 465 (1957). The Commission is of the opinion that this principle would also apply to an action by a utility to recover the difference between rates collected during the pendency of an appeal of rate reduction, and higher rates which may be established on remand.*[17]

The above-cited portions of the Allen Testimony relate to a proposal that is flatly barred by Ohio law. Accordingly, in the interest of judicial expediency, those portions should be stricken.

AEP Ohio could have avoided the result that is otherwise mandated by *Keco* by seeking a stay of execution while the Court considered the appeal of Case No. 10-2929-EL-UNC. R.C. 4903.16 provides that a party can seek a stay of the rates approved by a final order of the Commission upon the posting of a bond.[18] Yet even though AEP Ohio had sufficient financial resources with which to post a bond, it failed to do so. Or AEP Ohio could have requested that rates be collected subject to refund. It did neither. Accordingly, the Commission's hands are tied.

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[16] Entry Denying Application for Rehearing, *In the Matter of the Regulation of the Elec. Fuel Component Contained Within the Rate Schedules of the Dayton Power & Light Co. & Related Matters,* 86-07-EL-EFC (Apr. 14, 1987); Opinion and Order, *Green Cove Resort 1 Owners' Ass'n*, 00-1595-ST-CRC (Dec. 19, 2002); Entry on Rehearing, *In the Matter of the Application of Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.. in the Matter of the Complaint & Appeal by the Toledo Edison Co. from an Ordinance of the Vill. of Holgate Regulating the Price for Elec. Serv..,* 76-1061-EL-CMR (July 26, 1978); Entry, *In the Matter of the Complaint of the Lucas Cty. Commissioners, Complainants*, 95-1135-GA-CSS (Mar. 21, 1996); Entry on Rehearing, *In Re Telecommunications Act of 1996*, 96-1310-TP-COI (June 22, 2000); Order on Rehearing, *In the Matter of the Application of the Cleveland Elec. Illuminating Co. for Auth. to Amend & Increase Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv..,* 85-675-EL-AIR (Nov. 12, 1986); Opinion and Order, *In the Matter of the Complaint of A. Michael Schwarzwalder, Complainant*, 76-837-EL-CSS (Sept. 6, 1978); Opinion and Order on Remand, *In the Matter of the Application of Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.. in the Matter of the Complaint & Appeal by Toledo Edison Co. from an Ordinance of the Vill. of Holgate Regulating the Price for Elec. Serv..,* 76-1061-EL-CMR 2 (Dec. 19, 1979); *In Re Columbus S. Power Co.,* 08-917-EL-SSO (July 23, 2009).

[17] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base & Rate of Return of the Ohio Utilities Co.,* 77-1073-WS-COI (Aug. 23, 1978) at 1.

[18] *In re Application of Columbus S. Power Co.,* 128 Ohio St. 3d 512, 947 N.E.2d 655 at ¶17 (citing *Keco*).

II. AEP Ohio's Testimony Relies Upon Improper *"After-the Fact"* Evidence.

Multiple portions of the Allen Testimony attempt to use actual data compiled *after* the PUCO had already approved AEP Ohio's FRR capacity rate to contest the accuracy of the forecast relied upon by the PUCO when it established that rate. For instance, AEP Ohio seeks to employ this improper *"Monday morning quarterback"* approach to attack the forecasted fuel costs relied upon by the Commission in Case No. 10-2929-EL-UNC. On pages 16, lines 6-14, pages 16, line 15 through page 17, line 2, and Exhibit WAA-REM2, the Allen Testimony compares actual fuel cost data obtained after the Commission's decision to judge, in hindsight, the accuracy of the fuel cost data relied upon by the Commission. AEP Ohio also tries this 20/20 hindsight tactic on pages 17, lines 12 through 21 and Exhibit WAA-REM3 of the Allen Testimony to second-guess the forecasted heat rates relied upon by the Commission. And on page 14, line 6 through page 15, line 10 and in Exhibit WAA-REM1, AEP Ohio seeks to compare the forecasts used in Case No. 10-2929-EL-UNC to actual forward market prices obtained after August 8, 2012. It is improper for AEP Ohio to attempt to retroactively attack the Commission's decision by using actual market data obtained after a Commission decision.

The PUCO should reject AEP Ohio's attempt to use data obtained post-hearing to retroactively overturn a Commission decision and should strike those portions of the Allen Testimony. In determining whether utility decision-making is prudent, the PUCO examines *"what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made."*[19] This should be the standard employed by the Commission in considering the energy credit issue remanded by the Court. Otherwise, the PUCO would establish a dangerous precedent whereby parties could continually seek to revisit PUCO decisions rendered years before based upon post-decision data. This outcome would be contrary to *Keco* and its progeny and would invite perpetual litigation and rate uncertainty in Ohio.

[19] *In Re Ohio Edison Co.,* Case No. 11-5201-EL-RDR (Aug. 7, 2013) (citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993)*Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993)).

III. AEP Ohio's Proposal Exceeds the Scope of the Court's Instruction on Remand.

AEP Ohio misconstrues the scope of the remand required by the Court, to the detriment of its 1.2 million customers. In remanding the energy credit issue to the Commission, the Court merely required that the Commission sufficiently explain its decision to reject AEP Ohio's input arguments in favor of Staff's recommended energy credit inputs. The Court stated:

> *AEP also argues under this proposition of law that the methodology used to calculate the energy credit was unreliable because it utilized a number of flawed inputs, each resulting in an overstated energy credit. AEP claims that it pointed out specific flaws in certain inputs but the commission did not substantively address AEP's arguments or identify evidence in support of the order.* ***AEP is correct that the commission failed to address its arguments in any substantive manner. Accordingly, we remand the cause to correct this error.***[20]
>
> *****
>
> *"...the commission approved the staff's proposed energy credit without specifically addressing any of AEP's challenges to the inputs used in EVA's methodology...We find that the commission erred in two respects. First, the commission's order contains no record citations relevant to the pertinent issue, despite a claim that it reviewed all of the testimony. The commission did cite evidence on rehearing, but only for the purpose of showing that the staff's witnesses "sufficiently described [EVA's] methodology," and not for the purpose of directly addressing or refuting AEP's challenges to the inputs. Id. at 35. Second, the commission's analysis completely misses the mark. The dispute here is not one involving competing methodologies, as the commission found. Rather, the dispute is over how the staff and EVA applied their preferred methodology to calculate the energy credit. And because AEP's objection here was to the inputs and not the choice of methodologies, the commission's reference to the fact that "Staff argues the Company's energy credit is far too low," Capacity Order at 36, is not helpful. While the staff did indeed argue against AEP's proposed energy credit, AEP was not asking the commission to pick its preferred energy credit over the staff's in the context of this argument. Rather, AEP was challenging the accuracy of the staff's calculation of the energy credit by arguing that it was overstated as a result of faulty inputs. Even the commission, arguing in defense of the order, seems to concede that the order falls short, when it uses 11 pages of its third merit brief to "individually address each of [AEP's] claims." In sum, the commission's error is clear and prejudicial (if the energy credit is overstated, it results in an understated capacity charge).* ***Accordingly, we reverse this part of the order and direct the commission on remand to substantively address AEP's input arguments."***[21]

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[20] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.,* Slip Opinion No. 2016-Ohio-1607 at ¶51 (emphasis added).
[21] Id. at ¶53-57 (emphasis added).

Nowhere did the Court direct the PUCO to retroactively alter the amount of the FRR capacity rate adopted in Case No. 10-2929-EL-UNC. The directive issued was simply that the PUCO provide additional explanation in support of its decision on the energy credit issue. The PUCO has no authority to go beyond the scope of the Court's remand.[22] Consequently, AEP Ohio's attempt to broadly expand the scope of the remand proceeding in order to retroactively increase customer rates by $470 million should be rejected.

The PUCO can satisfy the remand by simply following the Court's directive to *"substantively address AEP's input arguments."* The PUCO could issue an Order on the energy credit issue based solely upon the existing record.

AEP Ohio customers should no longer be billed $4/MWh in RSR charges. If the Company's unlawful $470 million retroactive ratemaking proposal is rejected (plus $17.8 million in associated interest), and the $327 million RSR overcharge already paid by customers is adopted, then customers would owe no more to AEP Ohio.[23] And all RSR charges collected after June 1, 2016 (when the Commission made the charges subject to refund) should be returned to customers. This is the resolution the Supreme Court ordered when it directed the PUCO to *"adjust the balance of the deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP."*[24]

IV. Striking AEP Ohio's Unlawful Proposal is Consistent with Principles of Consistency and Equity.

Striking the above-cited portions of the Allen Testimony and barring AEP Ohio's unlawful request to retroactively increase customer charges by $470 million will not offend any principles of equity. AEP Ohio's customers have repeatedly been forced to absorb substantial costs later found to be unlawful by the Court as a result of *Keco's* prohibition on retroactive ratemaking. For instance, the *Keco* doctrine precluded a refund of $63

[22] *Nolan v. Nolan*, 11 Ohio St. 3d 1, 4, 462 N.E.2d 410, 413 (1984) (*"...the trial court is without authority to extend or vary the mandate given."*).
[23] Allen Exhibit WAA-REM5, line 3 shows a deferral balance of $433,193,119 as of October 1, 2016 assuming the Company is authorized to retroactively increase the balance by $470 million plus $17.8 million in associated interest. If that retroactive adjustment is not authorized, then the deferral balance will have been fully paid on or about June 1, 2016.
[24] *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

million to customers stemming from AEP Ohio's first ESP case.[25] And *Keco's* prohibition on retroactive ratemaking foreclosed customers from receiving a refund of $368 million in unlawful provider-of-last-resort charges collected by AEP Ohio.[26] Applying *Keco* with equal force to AEP Ohio is thus consistent with principles of consistency and fairness.

If the PUCO accepts the Company's proposal to engage in retroactive ratemaking, then this case is almost certain to return to the Supreme Court. If that occurs, then the PUCO will be hard-pressed to explain why *Keco* can be used to deny customers refunds of $63 million and $368 million, but is no bar to awarding the utility a retroactive rate increase of $470 million. This potential dilemma can be avoided by ruling upfront that a retroactive rate increase is not an option.

[25] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.
[26] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶ 56.

CONCLUSION

WHEREFORE, for the foregoing reasons, the PUCO should approve consolidation of these proceedings, but should consider these issues under a reasonable timeframe. The Commission should expressly state that the scope of any hearing will not include any evidence related to retroactively increasing AEP Ohio's FRR capacity deferral. The PUCO could, through an Order based on the existing record, substantively address AEP's energy credit input arguments. This would fulfill the Court's mandate.

When the admitted $327 million overcharge is included, and the $470 million retroactive rate increase is excluded, then the deferred capacity costs have already been fully repaid. Therefore, to fulfill the Court's mandate in the RSR appeal, the PUCO should terminate the RSR and refund to customers all funds collected after June 1, 2016.

Respectfully submitted,

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

COUNSEL FOR THE OHIO ENERGY GROUP

Bruce J. Weston
OHIO CONSUMERS' COUNSEL

Maureen R. Willis, Counsel of Record
Terry L. Etter
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9567 – Willis
(614) 466-7964 – Etter
Maureen.willis@occ.ohio.gov
Terry.etter@occ.ohio.gov

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

June 22, 2016

CERTIFICATE OF SERVICE

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Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.

aaragona@eimerstahl.com;
aehaedt@jonesday.com;
afreifeld@viridityenergy.com;
Amy.spiller@duke-energy.com;
Bojko@carpenterlipps.com;
campbell@whitt-sturtevant.com;
arthur.beeman@snrdenton.com;
bakahn@vorys.com;
BarthRoyer@aol.com;
bkelly@cpv.com;
cblend@porterwright.com;
bmcmahon@emh-law.com;
bpbarger@bcslawyers.com;
callwein@wamenergylaw.com;
carolyn.flahive@thompsonhine.com;
cathy@theoec.org;
cendsley@ofbf.org;
christopher.miller@icemiller.com;
clinton.vince@snrdenton.com;
cmontgomery@bricker.com;
cmooney@ohiopartners.org
cynthia.a.fonner@constellation.com;
dakutik@jonesday.com;
dan.barnowski@snrdenton.com;
Dan.Johnson@puc.state.oh.us;
Dane.Stinson@baileycavalieri.com;
Daniel.Shields@puc.state.oh.us;
dboehm@BKLlawfirm.com;
drinebolt@ohiopartners.org;
David.fein@constellation.com;
dconway@porterwright.com;
dparram@taftlaw.com;
dianne.kuhnell@duke-energy.com;
djmichalski@hahnlaw.com;
dmeyer@kmklaw.com;
Doris.McCarter@puc.state.oh.us;
Dorothy.corbett@duke-energy.com;
doug.bonner@snrdenton.com;
dstahl@eimerstahl.com;
dsullivan@nrdc.org;
eisenstatl@dicksteinsharpiro.com;
Elizabeth.watts@duke-energy.com;
emma.hand@snrdenton.com;
etter@occ.state.oh.us;
fdarr@mwncmh.com;
gary.a.jeffries@dom.com;
gpoulos@enernoc.com;
Maureen.willis@occ.ohio.gov;
Greg.Price@puc.state.oh.us;
gregory.dunn@icemiller.com;
greta.see@puc.state.oh.us;
glpetrucci@vorys.com
gthomas@gtpowergroup.com;
ghiloni@carpenterlipps.com;
haydenm@firstenergycorp.com;
henryeckhart@aol.com;
Hisham.Choueiki@puc.state.oh.us;
holly@raysmithlaw.com;
jmcdermott@firstenergycorp.com;
jejadwin@aep.com;
Jeanne.Kingery@duke-energy.com;
jeff.jones@puc.state.oh.us;
jestes@skadden.com;
jhummer@uaoh.net;
jkooper@hess.com;
jlang@calfee.com;
jmaskovyak@ohiopovertylaw.org;
jkylercohn@BKLlawfirm.com;
john.jones@puc.state.oh.us;
Jonathan.Tauber@puc.state.oh.us;
joseph.clark@directenergy.com;
joliker@igsenergy.com;
judi.sobecki@DPLINC.com;
keith.nusbaum@snrdenton.com;
kern@occ.state.oh.us;
kguerry@hess.com;
Kim.Wissman@puc.state.oh.us;
kinderr@dicksteinsharpiro.com;
korenergy@insight.rr.com;
kpkreider@kmklaw.com;
kwatson@cloppertlaw.com;

laurac@chappelleconsulting.net;
lehfeldtr@dicksteinsharpiro.com;
lkalepsclark@vorys.com;
lmcbride@calfee.com;
malina@wexlerwalker.com;
mkurtz@BKLlawfirm.com;
mjsettineri@vorys.com;
Michael.dillard@thompsonhine.com;
mpritchard@mwncmh.com;
matt@matthewcoxlaw.com;
mchristensen@columbuslaw.org;
msmalz@ohiopovertylaw.org;
mwarnock@bricker.com;
ned.ford@fuse.net;
ohioesp2@aep.com;
paul.wight@skadden.com;
pfox@hilliardohio.gov;
Philip.Sineneng@ThompsonHine.com;
Randall.griffin@DPLINC.com;
rburke@cpv.com;
ricks@ohanet.org;
rjhart@hahnlaw.com;
rmason@ohiorestaurant.org;
ascenzo@duke-energy.com;
rremington@hahnlaw.com;
rsugarman@keglerbrown.com;
sam@mwncmh.com;
sandy.grace@exeloncorp.com;
Sarah.Parrot@puc.state.oh.us;
sbruce@oada.com;
small@occ.state.oh.us;
ssalamido@cloppertlaw.com;
ssolberg@eimerstahl.com;
stephanie.chmiel@thompsonhine.com;
smhoward@vorys.com;
Stephen.chriss@wal-mart.com;
stnourse@aep.com;
steven.beeler@puc.state.oh.us;
swolfe@viridityenergy.com;
talexander@calfee.com;
Stephen.Reilly@puc.state.oh.us;
Tammy.Turkenton@puc.state.oh.us;
terrance.mebane@thompsonhine.com;
terry.etter@occ.ohio.gov;
Thomas.Lindgren@ohioattorneygeneral.gov;
thomas.mcnamee@ohioattorneygeneral.gov;
thompson@whitt-sturtevant.com;
tlindsey@uaoh.net;
toddm@wamenergylaw.com;
todonnell@bricker.com;
tdougherty@theOEC.org;
trent@theoec.org;
tsantarelli@elpc.org;
tsiwo@bricker.com;
Werner.margard@ohioattorneygeneral.gov;
whitt@whitt-sturtevant.com;
william.wright@ohioattorneygeneral.gov;
wmassey@cov.com;
yost@occ.state.oh.us;
zkravitz@cwslaw.com

Case No(s). 10-2929-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: Memorandum Ohio Energy Group and the Office of the Ohio Consumers' Counsel Memorandum Contra Motion for a Consolidated Resolution of Multiple Proceedings and Motion to Strike electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group and Office of Ohio Consumers' Counsel