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76 South Main Street
Akron, Ohio 44308

Arthur E. Korkosz
Senior Attorney

330-384-5849
Fax: 330-384-3875

July 30, 2010

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: ***In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities***
Case No. 09-786-EL-UNC

Enclosed for filing, please find the original and seventeen (17) copies of the *Application for Rehearing of Ohio Edison Company, The Toledo Edison Company and Cleveland Electric Illuminating Company* regarding the above-referenced case. Please file the enclosed *Application,* time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

Arthur E. Korkosz

Arthur E. Korkosz per auth by C.R. Schaff

AEK/sbs
Enclosures
cc: Parties of Record

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to S.B. 221 for Electric Utilities	**Case No. 09-786-EL-UNC**

APPLICATION FOR REHEARING
OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

Pursuant to Revised Code Section 4903.10 and Ohio Administrative Code Section 4901-1-35, Ohio Edison Company, The Cleveland Electric Company and The Toledo Edison Company (collectively "Companies") file their Application for Rehearing of the Commission's June 30, 2010 Finding and Order ("Order") submitting that the Order is unlawful and unreasonable for the following reasons:

1. The Commission's Order is unreasonable in imposing a general requirement for including information in an electric utility's annual SEET filing that is unrelated to a proper determination of the existence of *significantly* excessive earnings.

2. The Commission's Order is unlawful and unreasonable in relying upon highly subjective and uncertain criteria rather than primarily upon a statistical analysis to determine the existence of significantly excessive earnings.

3. The Commission's Safe Harbor provision under which a utility's earnings would be deemed not to be significantly excessive unreasonably excluded similar Safe Harbor treatment in circumstances where a utility's earnings were not more than 200 basis points above its most recently allowed rate of return on equity.

II. ARGUMENTS

The Companies submit the following arguments in support of the assignments of error set forth above:

A. **The Commission's Order is unreasonable in imposing a general requirement for including information in an electric utility's annual SEET filing that is unrelated to a proper determination of the existence of significantly excessive earnings.**

The Commission's Order in two respects directs the preparation of analyses and filing of information that is unrelated to the determination of the existence of significantly excessive earnings. The first of these appears at page 15, where the Order provides "In order to facilitate the valuation of the ESP adjustments, the electric utilities are directed to include in their SEET filings the difference in earnings between the ESP and what would have occurred had the preceding rate plan been in place." The second appears at page 16 where the Commission states "To facilitate the Commission's consideration of an electric utility's deferrals, in their SEET filings, the electric utility should identify any deferrals and the effects of excluding and including the deferrals in the SEET calculation."[1]

Neither of these bear on the initial, threshold question of whether, for a given annual period, an electric utility had significantly excessive earnings. While there may be some relationship of these analyses to determining the amount and manner of a return to customers of any significantly excessive earnings, that question is considered only if (and after) significantly excessive earnings are found to exist. A general requirement to include such information and analyses in all SEET filings, for all electric utilities, in every year, is burdensome and unnecessary. This is especially so where, as can be expected in the depressed economic circumstances of 2009, a Commission determination that reported returns trigger the SEET threshold is unlikely. Moreover, as the Commission has indicated, the issue of the return of any significantly excessive earnings to customers is to be evaluated case by case, thus presenting the opportunity, if necessary, to develop a record for addressing these issues. (Order, pp. 16, 32)

The first of these filing requirements is directed to a comparative analysis of current financial results with the expected results under a hypothetical continued existence of a prior rate

1 The Staff Recommendations did not endorse either of these requirements as part of the general annual filing materials for the SEET evaluation.

plan. Employing such a comparison, however, is inconsistent with the Commission's adoption, in the same paragraph of its Order, of the "one-step process" where the determination of the existence of significantly excessive earnings for a given annual period is made by comparison, for the same annual period, to the sum of the mean of the returns of a comparable group of companies plus an additional increment which sets the threshold for triggering a determination of significantly excessive earnings. The hypothetical result of what may have occurred under the extension of a prior rate plan has no bearing on this determination.[2] Moreover, the analysis of what may have happened under the extension of a prior rate plan may itself be rife with speculation and uncertain assumptions and surround the SEET analysis with even more uncertainty.[3] If there are no significantly excessive earnings, we need not reach the issues which even prompt a consideration of whether there should be a return to customers and, if so, through what mechanism. While the Commission correctly recognizes it should assure that there is no "claw back" into the earnings of a prior period in the context of formulating a plan for a return of significantly excessive earnings, that matter, too, does not become a concern unless and until the result of the initial SEET inquiry suggests that significantly excessive earnings may exist.

The issue with respect to the preparation and filing of analyses with and without the consideration of deferrals is similar. Conceptually, deferral accounting itself is intended to remove impacts to earnings from timing differences in earning revenues and incurring costs. By definition,

2 At the heart of the problem may be the several different contexts and meanings ascribed to the term "adjustments" when applied to SEET. As noted in the transcript of the April 1 Commission meeting, it is apparent that the term is used in several different ways and care is required to apply the proper meaning in context. (Transcript of April 1, 2010 Commission Meeting at 19-22 ("Tr. 19-22")). The Commission stated (Order, p. 15) that it intended to adopt the interpretation urged by FirstEnergy and the Customer parties (citing Tr. 20-22) that the phrase "any such adjustments" in the first sentence of Section 4928.143(F) should be read as referring to the first part of that sentence and the phrase "the provisions that are included in an electric security plan under this section". We continue to believe that is a correct interpretation of the statute but, if that is so it belies the Commission's statement earlier in the same paragraph that the term "adjustments" requires a comparison to the provisions of a prior rate plan ("More specifically, an adjustment for purposes of Section 4928.143(F), Revised Code, includes any change in rates when compared to the rates in the electric utility's preceding rate plan.") Since that improper interpretation is the basis for the requirement for filing the comparative analysis, it logically follows that the filing requirement, like the interpretation, is invalid and thus unnecessary.

3 Consider, for example, such a comparison in the context of the rate plan which preceded the current ESP in place for the FirstEnergy utilities. As illustrated in the pleadings before the Commission at the time in that ESP proceeding, there was disagreement about what components of the prior rate plan (e.g. RTC, fuel recovery) would continue in the absence of an ESP and there was no mechanism to recover post-date certain deferrals in the absence of the ESP. See, *e.g.*, in Case No. 08-935-EL-SSO, the Companies' Application for Rehearing filed January 9, 2009; the Companies' Memorandum in Contra to NOPEC and NOAC's Application for Rehearing filed February 2, 2009; and the Application for Rehearing by the Ohio Consumer and Environmental Parties filed February 2, 2009.

therefore, there can be no impact on significantly excessive earnings from authority to defer incurred costs. Deferrals are only meaningful in the context of SEET (unless specifically addressed in the context of an approved ESP) if significantly excessive earnings are found to exist and a return to customers is deemed appropriate (in which case deferrals can then become a very useful tool in effecting return of such excess). As noted above, however, the return to customers question is not reached unless the existence of significantly excessive earnings is first determined, a conclusion with which the Customer Parties appeared to concur. (Initial Comments, p. 16). The Customer Parties also recognized that issues surrounding deferrals arose in the context of only "some of the utilities", further supporting the view that a general requirement to supply these analyses is unnecessary. (*Id.*) The Commission notes that the "issues surrounding the treatment of deferrals are extremely complex" and concluded that for SEET purposes they should be considered on a case by case basis. (Order, p. 16) Indeed, in some cases, any issues involving the proper treatment of deferrals may already have been resolved as part of the underlying ESP which the Commission properly concluded controls. (*Id.*) In light of all these circumstances, burdening every SEET filing with a broad, universal requirement to submit analyses reflecting earnings with and without deferrals is unnecessarily burdensome, inappropropriate, and unreasonable.[4]

B. The Commission's Finding and Order is unlawful and unreasonable in relying upon highly subjective and uncertain criteria rather than primarily upon a statistical analysis to determine the existence of significantly excessive earnings.

In its Order, the Commission declined to adopt what it characterized as a "bright line statistical analysis test for the evaluation of earnings" although it did acknowledge that the "Commission may use a statistical analysis test as one tool by which to detemine whether an electric utility had significantly excessive earnings." (Order, p.29) Instead, it stated it would:

> give due consideration to certain factors, including, but not limited to, the electric utility's most recently authorized return on equity, the electric utility's risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to

4 Indeed, in the written comments submitted and at the April 1 Commission meeting, it appeared the issues regarding deferrals seemed directed to the circumstances of companies other than the FirstEnergy utilities.

> weather and economic risk; capital commitments and future capital requirements; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures, investments in advanced technology, and innovative practices; and the extent to which the electric utility has advanced state policy. We therefore, direct the electric utilities to include this information in their SEET filings."

(*Id.*)

In the record developed in this docket as well as those of the initial ESPs for the utilities, there was broad and persuasive record support for a test of the type recommended by the Commission's Staff which proposed SEET criteria reflecting an increment set above the mean of returns of the comparable group, which increment was based upon a multiple of the standard deviation of that mean. As explained in the record developed in the Companies' ESP case, that approach is an appropriate interpretation of the statute and reflective of the intent of the General Assembly.[5] The Commission's proposed additional factors here, however, improperly go far afield of that rationale.

Although one additional factor, the capital requirements of future committed investments in Ohio, is set out in the statute as permissible in the consideration of whether significantly excessive earnings exist, it is the *only* such discretionary factor specified by the General Assembly. *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is a fundamental principle of statutory construction[6] and is clearly applicable here. In specifying that the Commission may consider this one additonal element in the significantly excessive earnings determination, the statute precludes the Commission from relying on the potpourri of other discretionary, subjective factors which it listed in the Order. It follows that if the Commission is precluded from considering these factors, there is no reason to require a presentation of them as part of the utility's annual SEET filing.

Moreover, most of the factors listed are logically irrelevant, if not counterintuitive, to any

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[5] Direct Testimony of Dr. Michael J. Vilbert, Companies' Exhibit 8, pp. 3-4, Case No. 08-935-EL-SSO.

[6] *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.* (2010) 124 Ohio St.3d 390, 393, 2010-Ohio-169, 922 N.E.2d 945.

reasonable determination of what level of earnings should be deemed significantly excessive. For instance, how does information about rate design bear in any way on assisting in a resolution of this question? The variety of factors which touch on the state policy objectives articulated in Revised Code Section 4928.02 may, as directed by the General Assembly, be a factor to be considered in whether a particular ESP is to be adopted at all, but they no way assist in ascertaining whether a utility's earnings were significantly excessive. And while the Commission has asserted the quality of management performance may be an appropriate factor to consider determining, prospectively, the ROE to be allowed in a base rate proceeding (presumably to incent the continuation of exemplary management performance), how does it have any relevance to a determination, *in retrospect,* of whether earnings already achieved were significantly excessive?

Even assuming, *arguendo,* that there was some relevance of any of these factors to a determination of the existence of significantly excessive earnings, it is apparent that any application of them would be highly subjective and uncertain, and would offer little if any precedental guidance as to future application. Consideration of these factors which in themselves are so subject to interpretation would make the SEET potentially so subjective as to be completely arbitrary. Not only is this an inappropriate regulatory outcome, but it is one that has the likely consequence of increasing costs to customers as the uncertainty in application of the test is likely to be viewed as increasing regulatory risk[7] and, in turn, the utility's cost of capital. (See Companies' Reply Comments, pp. 6-7).

In summary, the approach the Commission takes in abandoning primary reliance upon a statistical analysis and instead including consideration of a variety of highly subjective, uncertain, *and irrelevant factors* is contrary to a correct interpretation of the statute, contrary to the recommendation of its Staff and the records developed in the various litigated ESP proceedings[8] and highly likely to have an effect which is detrimental to customers. Although the General Assembly

7 Including adding to the asymmetric risk which may arise as a result of an improper application of the test. (Tr. 58)

8 Dr. Vilbert in the Companies' ESP proceeding, Dr. Makhija in the AEP ESP proceeding, and even Dr. Woolridge, OCC's witness in both of those dockets, all relied (at least in part in the case of Dr. Woolridge) on a statistically based formulation of the threshold increment, reflecting a multiple of the standard deviation of the mean of the returns of the comparable companies.

permitted the Commission's limited consideration of the capital requirements of future committed investments in Ohio, the principal determinant of the existence of significantly excessive earnings should reflect a comparison with the returns of other companies including reliance on a statistically based threshold increment as advocated by the Commission's Staff and in the ESP proceedings.

C. The Commission's Safe Harbor provision under which a utility's earnings would be deemed not to be significantly excessive unreasonably excluded similar Safe Harbor treatment in circumstances where a utility's earnings were not more than 200 basis points above its most recently allowed ROE.

The Commission's Order properly adopted a Safe Harbor provision for the application of the SEET under which a utility whose ROE did not exceed 200 basis points above the mean of the comparable group of companies would be deemed not to have significantly excessive earnings. This expedient provides for ease of administration of the SEET in circumstances where the prospects of the existence of significantly excessive earnings should not be of concern. The Commission's Order, however, unreasonably failed to include within the scope of such a Safe Harbor provision another set of circumstances in which it should similarly be apparent and beyond dispute that a utility did not have significantly excessive earnings, namely, where the ROE actually earned by the utility in the annual period under review did not exceed by more than 200 bps the ROE allowed in the utility's last base rate case. By definition, an allowed return is deemed reasonable and, customarily, reflects consideration of evidence related to a market determined cost of capital for a sample of comparable risk companies. A utility may be expected to actually earn somewhat more or somewhat less than the ROE allowed, and if application of the SEET were to result in a determination of excessive earnings even though the earned ROE was within this expectation, the utility would not have a fair opportunity to earn its cost of capital. To avoid this problem, the Commission's Safe Harbor should also include a provision that an earned ROE less than 200 bps[9] above that allowed would not result in a determination of significantly excessive earnings.

[9] This is the same increment which it has already found provides an appropriate buffer interval for variation in achieved results

III. CONCLUSION

Based upon the foregoing, the Companies respectfully ask that their Application for Rehearing be granted.

Respectfully submitted,

Arthur E. Korkosz by CR Schaff

Arthur E. Korkosz (Attorney No. 0010587)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5849
Facsimile: (330) 384-3875
korkosza@firstenergycorp.com

ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments filed by Ohio Edison, The Cleveland Electric Illuminating Company and The Toledo Edison Company was served by United States Mail, prepaid, to the following persons, this 30th day of July 2010:

Arthur E Korkosz by C.R. Schuff

One of the Attorneys for Ohio Edison Company,
The Cleveland Electric Illuminating Company and
The Toledo Edison Company.

Public Utilities Commission of Ohio
Robert Fortney
180 East Broad St., 3rd Floor
Columbus, OH 43215

Industrial Energy Users (IEU)
Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
Joseph M. Clark
McNees Wallace & Nurick LlC
21 East State Street, 17th Floor
Columbus, OH 43215

Ohio Energy Group (OEG)
Michael L. Kurtz
David F. Boehm
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

Ohio Partners for Affordable Energy
David C. Rinebolt
Trial Attorney
Colleen L. Mooney
231 West Lima Street
PO Box 1793
Findlay, OH 45839-1793

Ohio Consumers' Counsel
Ann M. Hotz
Jeffrey L. Small
Jacqueline Lake Roberts
Gregory J. Poulos
Michael E. Idzkowski
Richard C. Reese
Maureen Grady
10 West Broad Street, 18th Floor
Columbus, OH 43215-3485

Nucor Steel Marion, Inc.
Garrett A. Stone
Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson Street, NW
Eighth Floor, West Tower
Washington, DC 20007-5201

Kroger Co
John W. Bentine
Mark S. Yurick
Matthew S. White
Chester Wilcox & Saxbe, LLP
65 E. State Street, Suite 1000
Columbus, OH 43215

Northwest Ohio Aggregation Coalition (NOAC)
Toledo
Leslie A. Kovacik
420 Madison Avenue, Suite 100
Toledo, Ohio 43624-1219

Northwest Ohio Aggregation Coalition (NOAC)
Lucas
Lance M. Keiffer
711 Adams Street, 2nd Floor
Toldedo, OH 43624-1680

Ohio Environmental Council
Barth E. Royer
Nolan Moser
Trent A. Dougherty
Bell & Royer, LPA
33 South Grant Avenue
Columbus, OH 43215

Northwest Ohio Aggregation Coalition
NOAC-Holland
Paul Skaff
Leatherman Witzler Dombey & Hart
353 Elm Street
Perrysburg, OH 43551

Northwest Ohio Aggregation Coalition
NOAC-Lake
Thomas R. Hays
Lake Township – Solicitor
3315 Centennial Road, Suite A-2
Sylvania, OH 43560

Northwest Ohio Aggregation Coalition
NOAC-Maumee
Sheila H. McAdams
Marsh & McAdams – Law Director
204 West Wayne Street
Maumee, OH 43547

Northwest Ohio Aggregation Coalition
NOAC-Northwood
Brian J. Ballenger
Ballenger & Moore – Law Director
3401 Woodville Road, Suite C
Toledo, OH 43619

Northwest Ohio Aggregation Coalition
NOAC-Oregon
Paul S. Goldberg
Oregon – Law Director
6800 W. Central Ave.
Toledo, OH 43617-1135

Northwest Ohio Aggregation Coalition
NOAC-Sylvania
James E. Moan
Sylvania – Law Director
4930 Holland-Sylvania Road
Sylvania, OH 43560

The Sierra Club Ohio Chapter
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Oh 43215

Constellation Energy Commodities Group, Inc., and Constellation NewEnergy, Inc.
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

Cynthia A. Fonner
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661

David I. Fein
Vice President, Energy Policy - Midwest
Constellation Energy Resources, LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661

Integrys Energy Services, Inc.
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

Bobby Singh
Integrys Energy Services, Inc
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085

Ohio Association of School Business Officials,
Ohio School Boards Association,
Buckeye Association of School Administrators
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

Direct Energy Services, LLC
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymore and Pease, LLP
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

Dominion Retail, Inc.
Barth E. Royer
Bell & Royer
33 South Grant Avenue
Columbus, OH 43215

Gary A. Jeffries
Senior Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817

Ohio Hospital Association
Richard L. Sites
General counsel and Senior Director of Health Policy
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620

Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, United Clevelanders Against Poverty, Cleveland Housing Network, The Empowerment Center of Greater Cleveland (Citizens Coalition)
Joseph P. Meissner
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113

National Energy Marketers Assoc.
Craig G. Goodman, Esq.
3333 K. Street, NW, Suite 110
Washington, D.C. 20007

Sean W. Vollman
David A. Muntean
Assistant Directors of Law
161 S. High Street, Suite 202
Akron, OH 44308

The Ohio Manufacturers' Association
Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215-3005

Ohio Farm Bureau Federation
Larry Gearhardt
Chief Legal Counsel
280 North High Street
Columbus, OH 43218-2383

Material Sciences Corporation
Craig I. Smith
2824 Coventry Road
Cleveland, OH 44120

FPL Energy Power Marketing, Inc. (PMI/GEXA)
F. Mitchell Dutton
700 Universe Blvd.
Juno Beach, FL 33408

FPL Energy Marketing, Inc. and Gexa Energy *Holdings, LLC*
Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215.

The City of Cleveland
Robert J. Triozzi
Steve Beeler
Gregory J. Dunn
Patrick Bonfield
John Danish
Christopher Miller
Andre T. Porter
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

OmniSource Corporation
Damon E. Xenopoulos, Esq.
Shaun C. Mohler
Brickfield, Burchette, Ritts & Stone, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007

Citizen Power, Inc., David Hughes, Kelli O'Neill, and Ronald O' Connell
Theodore S. Robinson
2121 Murray Avenue
Pittsburgh, Pa 15217

Northeast Ohio Public Energy Council and Ohio Schools Council
Glenn S. Krassen
E. Brett Breitschwerdt
Bricker & Eckler LLP
1375 E. 9th Street, Suite 1500
Cleveland, OH 44114

NOPEC
Glenn S. Krassen
E. Brett Breitschwerdt
Bricker & Eckler LLP
1375 E. 9th Street, Suite 1500
Cleveland, OH 44114

COSE
Steve Millard
The Higbee Building
100 Public Square, Suite 201
Cleveland, OH 44113

Wal-Mart Stores East LP and Sam's Club East, LP, Macy's Inc., and BJ's Wholesale Club, Inc.
(Collectively, the "Commercial Group")
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East, Suite 3800
Los Angeles, CA 90067-3218

The Commercial Group
Grace Wung
McDermott Will & Emery, LLP
600 Thirteenth Street, N.W.
Washington, DC 20005

American Wind Energy Association,
Wind on the Wires, Ohio Advanced Energy
Sally Bloomfield
Terrence O'Donnell
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Morgan Stanley Capital Group, Inc.
Douglas M. Mancino
McDermott Will & Emory LLP
2049 Century Park East, Suite 3800
Los Angeles, CA 90067-3218

Morgan Stanley Capital Group Inc.
Gregory K. Lawrence
McDermott Will & Emory LLP
28 State Street
Boston, MA 02109

Natural Resources Defense Council
Henry W. Eckhart
50 West Broad Street, #2117
Columbus, Oh 43215

Council of Smaller Enterprises
Nicholas C. York
Eric D. Weldele
Tucker Ellis & West L.L.P.
1225 Huntington Center
41 South High Street
Columbus, OH 43215

American Electric Power
Marvin Resnik
Stephen Nourse
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Duke Energy Power
Rocco D'Ascenzo
John Finnigan, Jr.
2500 Atrium II
P.O. Box 961
Cincinnati, OH 45201-0960

Ohio Home Builders Association
Thomas Froehle
Lisa McAlister
McNees, Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215

Dayton Power and Light
Judi Sobecki
1065 Woodman Drive
Dayton, OH 45432

Local 270, UWUA, AFL-CIO
Robert N. Fronek
4205 Chester Avenue
Cleveland, OH 44103

CURRENT Group LLC
Michael Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215

John Jones
William Wright
Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Steven Huhman
Vice President
Morgan Stanley Capital Group Inc.
2000 Westchester Avenue
Purchase, NY 10577

Amy Gomberg
Environment Ohio
203 East Broad Street., Suite 3
Columbus, Ohio 4321
Noel M. Morgan, Esq.
Counsel for Communities United for Action
215 E. Ninth Street, 500
Cincinnati, Ohio 45202

William L. Wright, Esq.
Thomas Lindgren
Thomas W. McNamee
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Thomas J. O'Brien, Esq.
Counsel for City of Cincinnati
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4236

Douglas E. Hart
Greater Cincinnati Health Council
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202

Robert P. Malloy
Village of Terrace Park
Wood & Lamping
600 Vine Street
Suite 2500
Cincinnati, Ohio 45202

Mary W. Christensen, Esq.
Counsel for People Working Cooperatively, Inc.
Christensen Christensen Donchatz Kettlewell & Ownes, LLC
100 East Campus View Blvd., Suite 360
Columbus, Ohio 43235

Robert Ukeiley, Esq.
Law Office of Robert Ukeiley
435R Chestnut Street, Suite 1
Berea, KY 40403

Ned Ford
539 Plattner Trail
Beavercreek, OH 45430

Ellis Jacobs
Advocates for Basic Legal Equality, Inc.
333 West First Street, Suite 500B
Dayton, Ohio 45402

Todd Williams, Esq.
4534 Douglas Road
Toledo, Ohio 43613

Scott H. Debroff
Stephen J. Romeo
Smigel, Anderson and River
Chase Center
4431 North Front Street
Harrisburg, PA 17110

Daniel Conway
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, Ohio 43215

Emma F. Hand
Ethan E. RII
Reed R. Presley
Sonnenschein Nath & Rosenthal LLP
1301 K Street NW
Suite 600 East Tower
Washington, D.C. 20005

Teresa Orahood
Bricker & Ecker
100 South Third Street
Columbus, Ohio 43215

Benjamin Edwards
Attorney at Law
One East Livingston Ave
Columbus, Ohio 43215

Jennifer Duffer
Armstrong & Okey, Inc.
222 East Town Street 2nd Floor
Columbus, Ohio 43215

Terry Etter
Ohio Consumers' Counsel
10 W. Broad Street
Suite 1800
Columbus, Ohio 43215

Michael J. Settineri
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43215

Community Improvement Corporation
Norm Blanchard
806 Cochran Ave.
Cambridge, Ohio 43725
Coshocton Port Authority
106 South Fourth Street
Coshocton, Ohio 43812

Environment Ohio – Environmental Advocate
Amy Gomberg
203 East Broad Street, Ste 3
Columbus, Ohio 43215

Fairfield County Economic Development
William R Arnett
210 East Main Street
Room 404
Lancaster, Ohio 43130

Jennifer Garrison
State Representative 93rd House District
77 South High Street
Columbus, Ohio 43215

Paulding County Economic Development, Inc
101 E. Perry Street
Paulding, Ohio 45879

Debbie Phillips
State Representative 92nd House District
77 South High Street
Columbus, Ohio 43215

Southgate Corporation
1499 West Market Street
P.O. Box 397
Newark, Ohio 43058.

Michelle M. Mills
St. Stephen's Community House
1500 east 17th Avenue
Columbus, Ohio 43219

Widener, Faia, Chris
10th Senate District
Senate Building
Columbus, Ohio 43215

Appalachian People's Action, Coalition
Michael R. Smalz
Ohio State Legal Service, Assoc.
555 Buttles Ave
Columbus, Ohio 43215

Constellation Energy Commodities Group, Inc.
VP Regulatory Affairs
John Orr
111 Market Place
5th Floor
Baltimore, MD 21202

Integry's Energy Services Inc.
Amy Klavitar
500 W. Madison Street
Suite 3300
Chicago, IL 60661

Consumer Power Line
17 State Street
19th Floor
New York, NY 10004

Ohio Manufacturers Assn
33. N. High Street
Columbus, Ohio 43215

Clinton A. Vince
Ormet Primary Aluminum Corp.
Sonnenschein Nath & Rosenthal LLP
1301 K Street N.W.
Suite 600
East Tower
Washington, D.C. 20005

Abbott Nutrition
Glenn D. McGee
6480 Busch Blvd.
Columbus, Ohio 43229

Environmental Management Services, Inc.
P.O. Box 175
Dublin, Ohio 43017

Hon. Jimmy Stewart
Ohio Senate 20th District
Senate Building
Columbus, Ohio 43215

International Brotherhood of Electrical Workers
Fourth
District
Corporate Plaza
6450 Rockside Woods Blvd., South
Suite 150
Independence, Ohio 44131

OSCO Industries, Inc.
John Burke
Vice President
919 Chillicothe Street
Portsmouth, Ohio 45662

Northwest Ohio Aggregation Coalition
Paul S. Goldberg, Law Director
Phillip D. Wurster, Asst. Law Director
5330 Seaman Road
Oregon, Ohio 43616