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FROM• Emma F. Hand

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MESSAGE :

RE: 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 Nos. 11-346-EL-SSO, 11-348-EL-SSO; et al

Enclosed for electronic filing is the Motion to Strike of Ormet Primary Aluminum Corporation.

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company and Columbus)	
Southern Power Company for)	Case No. 10-2376-EL-UNC
Authority to Merge and Related)	
Approvals.)	
)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
and Ohio Power Company for)	Case No. 11-346-EL-SSO
Authority to Establish a Standard)	Case No. 11-348-EL-SSO
Service Offer Pursuant to Section)	
4928.143. Revised Code, in the Form of)	
an Electric Security Plan.)	
)	
In the Matter of the Application of)	
Columbus Southern Power Company)	Case No. 11-349-EL-AAM
and Ohio Power Company for)	Case No. 11-350-EL-AAM
Approval of Certain Accounting)	
Authority.)	
)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
to Amend its Emergency Curtailment)	Case No. 10-343-EL-ATA
Service Riders.)	
)	
In the Matter of the Application of)	
Ohio Power Company to Amend its)	
Emergency Curtailment Service)	Case No. 10-344-EL-ATA
Riders.)	
)	
In the Matter of the Commission)	
Review of the Capacity Charges of)	
Ohio Power Company and Columbus)	Case No. 10-2929-EL-UNC
Southern Power Company.)	
)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
for Approval of a Mechanism to)	
Recover Deferred Fuel Costs Ordered)	Case No. 11-4920-EL-RDR
Under Section 4928.144, Ohio Revised)	
Code.)	

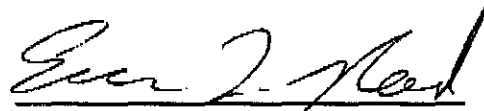
In the Matter of the Application of
Ohio Power Company for Approval of
a Mechanism to Recover Deferred
Fuel Costs Ordered Under Section
4928.144, Ohio Revised Code.

Case No. 11-4921-EL-RDR

(Consolidated)

**MOTION TO STRIKE
OF ORMET PRIMARY ALUMINUM CORPORATION**

Ormet Primary Aluminum Corporation ("Ormet"), by its undersigned counsel, respectfully moves the Ohio Public Utilities Commission to strike from the *Joint Reply Brief of the Undersigned Signatory Parties* (1) the last sentence on page 21 beginning with "And, as discussed in detail in the Signatory Parties' Joint Brief, . . ." through the end of the first full paragraph on page 22, ending with ". . . to be treated differently under the Stipulation in this proceeding." and (2) the last full sentence on page 24, starting with "And Ormet's load factor and peak demand . . ." and ending ". . . have not enjoyed." The reasons supporting this motion are set forth in the attached Memorandum in Support.



Emma F. Hand (PHV - 1353-2011)
Douglas G. Bonner (PHV - 1363-2011)
SNR Denton US LLP
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005
Tel: 202-408-6400
Fax: 202-408-6399
emma.hand@snrdenton.com
doug.bonner@snrdenton.com

*Attorneys for Ormet Primary Aluminum
Corporation*

November 22, 2011

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company and Columbus)	
Southern Power Company for)	Case No. 10-2376-EL-UNC
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Approvals.)	
)	
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Authority to Establish a Standard)	Case No. 11-348-EL-SSO
Service Offer Pursuant to Section)	
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Approval of Certain Accounting)	
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Review of the Capacity Charges of)	
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Under Section 4928.144, Ohio Revised)	
Code.)	

In the Matter of the Application of
Ohio Power Company for Approval of
a Mechanism to Recover Deferred
Fuel Costs Ordered Under Section
4928.144, Ohio Revised Code.

Case No. 11-4921-EL-RDR

(Consolidated)

MEMORANDUM IN SUPPORT OF ORMET PRIMARY ALUMINUM CORPORATION'S MOTION TO STRIKE

INTRODUCTION

In their November 18, 2011 *Joint Reply Brief of the Undersigned Signatory Parties* ("Signatory Parties' Reply Brief") in this proceeding, the Signatory Parties make several statements that are not supported by the record and attempt to circumvent the bench's ruling regarding the issue of Ormet's kWh tax exemption status. These sections of the Signatory Parties' Reply Brief should be stricken for the same reasons articulated in Ormet's November 15, 2011 motion to strike¹ certain similar sections of the Signatory Parties' Initial Brief.²

ARGUMENT

It is a bedrock principle of administrative law that allegations must be supported by the record of the case. The Commission regularly strikes evidence that was not a part of the record when a party seeks to introduce it in post-hearing briefing as the Signatory Parties have here. *Re United Telephone Co. of Ohio*, No. 07-760, 2008 WL 449797, *15 (Ohio P.U.C. Feb. 13, 2008) (striking section of post-hearing brief referencing facts not in record); *see OhioTelnet.Com, Inc. v. Ameritech Ohio*, No. 01-2444, 2002 WL 31319425, *1 (Ohio P.U.C. Aug. 8, 2002) (same). The Signatory Parties should not be permitted to introduce new evidence at this late stage of the

¹ Motion to Strike and Memorandum in Support of Ormet Primary Aluminum Corporation, filed Nov. 15, 2011 ("First Motion to Strike").

² Joint Initial Brief of the Undersigned Signatory Parties, filed Nov. 10, 2011.

proceeding when other parties have no opportunity to test or dispute that evidence through discovery or cross-examination. To give any weight to facts not in the record risks destroying the proper foundation necessary for a decision that can withstand appellate review.

The Commission also regularly strikes irrelevant evidence pursuant to its statutory authority. See, e.g., *In re Application of Columbus Southern Power Co.*, No. 08-917, 2011 WL 3202942, *3 (Ohio P.U.C. July 9, 2011) (granting AEP Ohio's motion to strike based on relevance); *City of Reynoldsburg v. Ohio PUC*, No. 08-846, 2011 WL 1428237, *21 (Ohio P.U.C. April 5, 2011); see also Ohio Rev. Code § 4901-1-27. At issue in this case is whether the rate to be imposed upon Ormet in the proposed Stipulation is unduly discriminatory and prejudicial. Ohio law forbids AEP Ohio from charging different rates to customers for whom it does "a like and contemporaneous service under substantially the same circumstances and conditions." 49 Ohio Rev. Code § 4905.33 and *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n of Ohio*, 820 N.E.2d 885, 888 (Ohio 2004).

A "reasonable differential or inequality of rates" can only be justified "where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer." *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979) (emphasis added). Any evidence not related to whether the rate differential is based upon some actual and measurable difference in the service furnished to Ormet is not relevant to this proceeding. The Commission should strike the passages in the Signatory Parties' Brief in this proceeding that address Ormet's kilowatt hour ("kWh") tax status and its power arrangement history back to 1952 as irrelevant to the issue of whether imposing a rate differential on Ormet going forward constitutes undue and unreasonable prejudice and discrimination.

The following sections of the Signatory Parties' Reply Brief simply are not supported by the record and are irrelevant to any issue in this case: (1) from the last sentence on page 21

beginning with “And, as discussed in detail in the Signatory Parties’ Joint Brief, . . .” through the end of the first full paragraph on page 22, ending with “. . . to be treated differently under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with “And Ormet’s load factor and peak demand. . .” and ending “. . . have not enjoyed.”

I. The Signatory Parties’ Argument Regarding Ormet’s Past Contractual Arrangements with AEP Ohio Is Not Relevant to Any Issue Before the Commission in this Proceeding.

As in their Initial Brief, the Signatory Parties argue in their Reply Brief that Ormet’s *contractual* history justifies treating Ormet as unique for the purposes of the prospective *tariff* rate at issue in these proceedings. As explained in Ormet’s initial motion to strike,³ Ormet’s power contract history is irrelevant to whether the Load Factor Provision (“LFP”) in the proposed tariff is unduly discriminatory under the Commission’s standards for assessing undue discrimination and is largely unsupported by the record. Courts frequently reject antiquated historical observations like that of Ormet’s history as irrelevant to a current analysis of undue discrimination. *Mahoning Cnty. Townships*, 388 N.E.2d at 740, 744 (Ohio 1979). Therefore, the Commission should strike the stale, irrelevant argument about the last half-century of Ormet’s history.

Furthermore, the Signatory Parties fail to explain how the negotiated, bilateral power agreements they discuss in their brief are relevant to the issue of what *tariff* rate should be applied prospectively to Ormet. Bilateral power agreements are not established through the same procedures as tariffs. Ormet’s history of bilateral power agreements is not relevant to any issue in this proceeding. For these reasons and the reasons explained in Ormet’s initial motion to strike,⁴ the last sentence on page 21 of the Signatory Parties’ Reply Brief beginning “And, as

³ First Motion to Strike at pp. 5-7.

⁴ *Id.* at pp. 6-7.

discussed in detail. . .” through the first full sentence on page 22 ending “. . . to other customers” should be stricken or, alternatively, given no weight by the Commission.

II. The Commission Should Strike the Unsupported Factual Assertions that the Signatory Parties’ Make to Support their Argument that Ormet is Not Similarly Situated to Other High Load Factor Customers.

There is no support in the record for the first full paragraph on page 22 of the Signatory Parties’ Reply Brief, so it must be stricken. In this paragraph, the Signatory Parties argue that Ormet is not similarly situated to other customers because of its kWh tax status and because of its large size. There is no evidence in the record regarding Ormet’s tax status or the amount that Ormet pays or does not pay under the kWh tax.⁵ There is also no evidence in the record that Ormet’s tax status and any benefits it receives thereunder actually distinguish it from parties that benefit from the LFP. Accordingly, the discussion of Ormet’s tax status must be stricken as unsupported by evidence in the record. If it is not stricken, then the Commission should not give the argument or its supporting facts any weight in making its determination in this proceeding.

As to the second assertion contained in the paragraph, that Ormet’s size makes it unique, the Signatory Parties also cite no record evidence. In support of their assertion, they write “And Ormet itself states that it “has a peak demand of approximately 520 MW, and that its very large size makes Ormet unique.” They have, however, grossly misrepresented the statement in Ormet’s brief. The complete sentence on page 17 of Ormet’s brief reads as follows: “*OEG argues that Ormet* has a peak demand of approximately 520 MW, and that its very large size makes Ormet unique.” (emphasis added). The Signatory Parties’ reliance on this misrepresentation underscores their lack of record evidence to support their position. Rather than supporting their argument with record evidence, they creatively crop a sentence from

⁵ Counsel for the Ohio Energy Group (“OEG”) attempted to improperly introduce such evidence in re-direct, and was properly prohibited from doing so by the bench. TR at 267:22-268:15.

Ormet's brief that paraphrased an argument made by one of the Signatory Parties and outrageously call it an admission by Ormet. They cite no record evidence in support of any assertion made in the first full paragraph on page 22. Accordingly, the Commission should strike the entire paragraph, beginning with "Further, Ormet . . ." and ending with "in this proceeding."

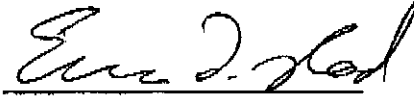
The same problems plague the last full sentence on page 24, which reads "And Ormet's load factor and peak demand have assisted it in securing unique arrangements for its electric service and exemption from the kilowatt hour tax that other customers have not enjoyed." No record evidence addresses whether Ormet's load factor and peak demand assisted in securing unique arrangements for its electric service. Similarly, no evidence in the record relates to Ormet's kilowatt hour tax status or whether any other parties enjoy similar status. Without record support, these statements should all be stricken or, alternatively, given no weight.

In addition to being unsupported by the record, Ormet's kWh tax status is not relevant to any issue in this proceeding. Whether or not Ormet is eligible for a statutorily created tax exemption from the kWh tax is simply unrelated to the relevant issue of whether or not there is a difference in the furnishing of services to Ormet. The Signatory Parties' unsupported post-hearing arguments regarding Ormet's eligibility for a tax exemption distract from the relevant inquiry of whether there exist actual and measurable differences between services furnished to Ormet and services furnished to the LFP beneficiaries and should be stricken.

CONCLUSION

WHEREFORE, for the reasons stated above, Ormet respectfully moves the Commission to strike the following sections of the Signatory Parties' Reply Brief: (1) from the last sentence on page 21 beginning with "And, as discussed in detail in the Signatory Parties' Joint Brief, . . ." through the end of the first full paragraph on page 22, ending with ". . . to be treated differently

under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with
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Emma F. Hand (PHV - 1353-2011)

Douglas G. Bonner (PHV - 1363-2011)

SNR Denton US LLP

1301 K Street, NW

Suite 600, East Tower

Washington, DC 20005

Tel: 202-408-6400

Fax: 202-408-6399

emma.hand@snrdenton.com

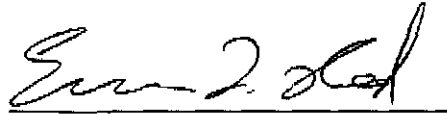
doug.bonner@snrdenton.com

*Attorneys for Ormet Primary Aluminum
Corporation*

November 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion to Strike and Memorandum in Support of Ormet Primary Aluminum Corporation* was served by U.S. Mail and email upon counsel identified below for all parties of record this 22nd day of November, 2011.



Emma F. Hand

SERVICE LIST

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

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

Dorothy K. Corbett
Duke Energy Retail Sales
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
Dorothy.Corbett@duke-energy.com

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

Samuel C. Randazzo
Joseph E. Oliker
Frank P. Darr
Vicki L. Leach-Payne
Joseph M. Clark
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com

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

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com

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

Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
etter@occ.state.oh.us
grady@occ.state.oh.us

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

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

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

Terrence O'Donnell
Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com
Jesse A. Rodriguez
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, Pennsylvania 19348
jesse.rodriguez@exeloncorp.com

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, Pennsylvania 19406
gthomas@gtpowergroup.com

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

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

Lisa G. McAlister
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
lmcaster@bricker.com
mwarnock@bricker.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Laura Chappelle
4218 Jacob Meadows
Okemos, Michigan 48864
laurac@chappelleconsulting.net

Pamela A. Fox
Law Director
The City of Hilliard, Ohio
pfox@hilliardohio.gov

United Way of Jefferson County
501 Washington Street
P.O. Box 1463
Steubenville, OH 43952

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

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

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

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

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, Virginia 20115
holly@raysmithlaw.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
barthroyer@aol.com

John H. Jones
Vern Margard
Public Utilities Section
Ohio Attorney General Mike DeWine
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us

Greg Poulos
EnerNOC, Inc.
101 Federal St.
Boston, Massachusetts 02110
gpoulos@enernoc.com

Carolyn S. Flahive
Terrance A. Mebane
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Carolyn.Flahive@ThompsonHine.com
Terrance.Mebane@ThompsonHine.com

Leo Antons
1237 Cisler Dr.
Marietta, OH 45750
leoantons@suddenlink.net

E. Camille Yancey
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
camille@theoec.org
nolan@theoec.org
trent@theoec.org

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

David A. Kutik
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Christopher J. Allwein
1373 Grandview Ave.
Suite 212
Columbus, OH 43212
wein@williamsandmoser.com

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

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

Allison E. Haedt
Grant W. Garber
Jones Day
P.O. Box 165017
325 John H. McConnell Boulevard
Suite 600
Columbus, Ohio 43216-5017

J. Kennedy And Associates
570 Colonial Park Drive
Suite 305
Roswell, GA 30075

Jennifer Duffer
Armstrong & Okey, Inc.
222 East Town Street
2nd Floor
Columbus, OH 43215
jduffer@ameritech.net

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

Lija K. Kaiaps-Clark
M. Howard Petricoff
Vorys, Sater, Seymour and Pease
52 E. Gay St.
PO Box 1008
Columbus, OH 43216
lkaiapsclark@vorys.com
mhpetricoff@vssp.com

Canton Chamber Of Commerce
229 Wells Ave N.W.
Canton, OH 44703-1044

Bill Dingus
Lawrence Economic Development Corporation
P.O. Box 488
South Point, OH 45680-0488

Amy Spiller
Duke Energy Ohio
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Amy.Spiller@Duke-Energy.com

Constellation NewEnergy Inc
Cynthia Fonner Brady
550 W Washington Street
Suite 300
Chicago, IL 60661
Cynthia.Brady@constellation.com

FirstEnergy Solutions Corp
Louis M. D'Alessandris
341 White Pond Drive
Akron, OH 44320
ldalelessandris@firstenergy.com

Denis George
Kroger Company
1014 Vine Street-G07
Cincinnati, OH 45202-1100

Ohio Partners For Affordable Energy
David C. Rinebolt
231 West Lima St.
P.O. Box 1793
Findlay, OH 45839-1793
drinelbolt@aol.com

Steve Howard
52 East Gay St.
P.O. Box 1008
Columbus, OH 43215
smhoward@vorys.com

AEP Retail Energy Partners LLC
Anne M. Vogel
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
amvogel@aep.com

Shawnee State University
940 Second Street
Portsmouth, OH 45662

Mark A. Whitt
Carpenter, Lipps & Leleand LLP
280 Plaza, Suite 1300
280 North High Street
Columbus OH 43215

Jeffrey Small
Jody M. Kyler
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
small@occ.state.oh.us
kyler@occ.state.oh.us

Jacqueline Lake Roberts
EnerNOC, Inc.
13212 Haves Corner Road SW
Pataskala OH 43062

The Sierra Club
50 West Broad Street #2117
Columbus, OH 43215

Meigs County Commissioners
Michael Davenport, President
100 East Second Street
Pomeroy, OH 45769

Tuscarawas County
330 University Drive NE
New Philadelphia, OH 44663

Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005

Deb J. Bingham
Patti Mallarnee
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Philip.Sineneng@ThompsonHine.com