BEFORE THE
PUBLIC UTILITES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	:	Case No. 10-2376-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 §4928.143, Ohio Rev. 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 Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-344-EL-ATA
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 for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	:	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	:	Case No. 11-4921-EL-RDR

OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION

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On February 17, 2012, the Industrial Energy Users – Ohio (IEU) filed a second application for rehearing purporting to challenge the January 23, 2012 Entry (Compliance Entry) addressing Ohio Power Company's (AEP Ohio's) compliance with the December 14, 2011 Opinion and Order (Opinion and Order). While parties are permitted to file a second application for rehearing relating to a new issue addressed and decided in a subsequent order that is issued after the primary decision in the proceeding, parties cannot use a subsequent order as an opportunity to submit an untimely challenge of the earlier decision.[1] IEU's second application for rehearing is a late-filed and improper challenge of the Commission's December 14, 2011 Opinion and Order and must be rejected or ignored. In any case, IEU's arguments also lack merit.

ARGUMENT

I. Both of IEU's requests for rehearing are untimely and the Commission lacks jurisdiction to grant them. Ohio Rev. Code Ann. § 4903.10 (2012); *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 375 (2007); *Greer v. Pub. Util. Comm.*, 172 Ohio St.361, 362 (1961); *Pollitz v. Pub. Util. Comm.*, 98 Ohio St. 445 (1918).

[1] R.C. 4903.10 permits a party to timely apply for rehearing of any order as to matters determined by that order. *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 333 (1988). For example, AEP Ohio filed a second application for rehearing in this docket after the Commission issued the Compliance Entry which made additional determinations beyond the Opinion and Order that caused harm to AEP Ohio. Unlike IEU, however, AEP Ohio demonstrated in detail as part of its second application for rehearing that the challenged aspects of the Compliance Entry were new decisions that went beyond anything adjudicated in the Opinion and Order. (*See* AEP Ohio February 10, 2012 Application for Rehearing at 5-21.)

In its first ground for rehearing, IEU (at 10) asks the Commission to "make it clear that governmental aggregation programs, regardless of when they were approved, which complete the necessary process to take service in OP's service territory by December 31, 2012, will have access to RPM-priced capacity." As explained by IEU (at 9), its first rehearing request is in response to the Compliance Entry's statement on page 4 that the Opinion and Order was meant to include all communities that have established governmental aggregation programs up to and including those communities that approved government aggregation programs in the November 2011 election. Thus, while IEU beats around the bush in stating the specific relief being sought, its first rehearing argument seeks to also have included within the aggregation RPM set-aside any communities that complete the aggregation process *after November 2011 and before the end of 2012*. That request is untimely and otherwise without merit.

The Opinion and Order explained the modification to the RPM set-aside for aggregation was for November 2011 ballot initiative communities:

> Although currently shopping customers will not be adversely affected by the capacity set-aside provisions, the Commission is greatly *concerned that governmental aggregations approved by communities across the state in the November 2011 election will be foreclosed from participation* by the September 7, 2011 Stipulation. It is the state policy to ensure the availability of unbundled and comparable retail electric service to all customer classes, including residential customers, and governmental aggregation programs have proven to be the most likely means to get substantial numbers of residential customers to become the customer of a CRES provider. For these reasons, we find it necessary to modify the proposed Stipulation to adjust the RPM set-aside levels *to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election* to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside, so long as the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012.

Opinion and Order at 54 (emphasis added).

Thus, the modification made in the Opinion and Order was limited to accommodating the load associated with communities that approved a governmental aggregation program in the November 8, 2011 election, not any aggregation that may occur by the end of 2012. That the Commission's modification was limited to the November 2011 election is also unequivocally confirmed elsewhere in the Opinion and Order. The Opinion and Order indicated (at 64) that it already addressed concerns about shopping caps "by modifying the Stipulation to include governmental aggregation *ballots that passed this November*." (Emphasis added.) The Opinion and Order also referenced (at 65) that the above "modification of the capacity plan allows for all of the communities and municipalities that *recently passed governmental aggregation initiatives this November* to take advantage of CRES suppliers' offers that may be lower than what AEP-Ohio is offering to its customers." (Emphasis added.)

Because the Opinion and Order already held that the aggregation set-aside would be limited to the November 2011 ballot initiative communities, IEU's request to expand the aggregation set-aside to include post-November communities should have been filed within 30 days of the Opinion and Order (*i.e.*, on or before January 13, 2012).[2] It has

[2] The Compliance Entry (at 4) subsequently interpreted the Opinion and Order as having meant to also include communities that authorized aggregation prior to the November 2011 ballot initiatives. Through its February 10, 2012 Application for Rehearing, AEP Ohio has filed a timely challenge to this aspect of the Opinion and Order – the expansion from including the November communities to including the November and pre-November communities. The Opinion and Order, however, cannot be reasonably interpreted to include the post-November communities. Likewise, it cannot be said that the Compliance Entry contracted the aggregation set-aside on this point as compared to the Opinion and Order. Consequently, it is clear that IEU's present request to expand the Opinion and Order's aggregation set-aside to include post-November communities is an untimely rehearing request.

long been established that the Commission cannot modify one of its adjudicatory orders absent a timely application for rehearing and following the statutory rehearing process. *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361 (1961); *Pollitz v. Pub. Util. Comm.*, 98 Ohio St. 445 (1918). More directly in the context of examining IEU's second application for rehearing, the Court has held that the Commission simply has no jurisdiction to entertain an application for rehearing filed after the expiration of such 30-day period. *Greer*, 172 Ohio St. at 362.

As a related matter, the Supreme Court has only recently reinforced this well-established principle that R.C. 4903.10 permits the Commission "to modify an order only after granting an application for rehearing." *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360 (2007). Because the Commission in the *Discount Cellular* case had not granted rehearing, the Court held that the Commission "acted beyond its statutory authority when it cited in its rehearing order an additional reason for dismissing Discount's complaint." *Discount Cellular*, 112 Ohio St.3d at 375. Thus, the Court strictly held that, absent granting rehearing, the Commission could not even add an additional reason supporting the same decision and same result. In other words, the Commission cannot even change the rationale for its order on rehearing without a pending rehearing request and after granting rehearing. In the present context, application of these well-established principles means that IEU's first rehearing request to include the post-November communities in the aggregation set-aside should have been raised within 30 days of the Opinion and Order – but it was not raised by IEU until nearly 60 days after the Opinion and Order.

IEU also makes a second argument in its application for rehearing, asking the Commission (at 12) to "remove the unreasonable and unlawful December 31, 2012 restriction that it has placed on governmental aggregation programs." There can be no question that the Opinion and Order had already established the December 31, 2012 deadline. In fact, the language used in Finding 14 of the Compliance Entry is identical to the language used in on page 54 of the original Opinion and Order. In both cases, the Commission granted the involved aggregation communities access to RPM-priced capacity so long as "the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012."

Since the same exact language was used in both orders to convey this deadline, IEU cannot now claim that the subsequent Compliance Entry established for the first time the December 31, 2012 restriction. Thus, because the Opinion and Order clearly set forth this same limitation on governmental aggregation load receiving RPM set-aside, IEU's second argument is also an untimely rehearing request that cannot be entertained by the Commission. Based on the legal precedents discussed above in connection with IEU's first rehearing argument, AEP Ohio submits that the Commission also lacks jurisdiction to entertain IEU's second rehearing argument.

In sum, the Commission lacks jurisdiction to entertain either of IEU's arguments contained in its second application for rehearing.

II. To the extent the Commission considers IEU's second application for rehearing, it should refuse to include post-November 2011 communities in the RPM set-aside or extend the deadline for completing the aggregation process beyond the end of 2012.

A. Common reasons to reject both IEU grounds for rehearing

For the reasons set forth below and for the reasons previously articulated in this docket,[3] the Commission should not further expand the RPM-priced capacity set-aside. In substance, IEU's second rehearing represents the beginning of an effort to artificially drive and expand additional governmental aggregation based on the interests of mercantile customers and in a way that would impose material economic hardship on AEP Ohio. This would be accomplished by allowing the formation of new post-November aggregation efforts that are driven by mercantile interests rather than the residential consumer interests that drove the Commission to expand the RPM set-aside to begin with. Thus, beyond being untimely and without merit, the underlying purpose of IEU's second application for rehearing further illustrates why the Commission should hold that mercantile customers are not entitled to RPM-priced capacity if they participate in governmental aggregation programs. AEP Ohio has already addressed the reasons supporting its position in this regard. (*See* AEP Ohio's February 10, 2012 Application for Rehearing at 11-16.) Significantly, IEU's request would merely serve to exacerbate the existing problems associated with the Compliance Entry's decision to require AEP

[3] Much has been debated in this docket about the meaning, scope and extent of the aggregation set-aside. AEP Ohio submitted multiple challenges to the Opinion and Order's aggregation-related modification of the Stipulation's RPM set-aside and filed a second application for rehearing related to the new and enhanced obligations relating to the aggregation set-aside imposed on AEP Ohio by the Compliance Entry. AEP Ohio's opposition to both of the positions being advanced here by IEU (adding additional communities beyond the November ballot communities and allowing more than a couple months extra time to accommodate additional aggregation) have been addressed in detail already as part of AEP Ohio's January 13 application for rehearing, its February 10 application for rehearing and its memorandum in opposition to intervenor requests for rehearing. Those arguments will not be repeated here but AEP Ohio will briefly provide a response to IEU's latest pleading on these subjects.

Ohio to fund additional RPM-priced capacity mercantile customers that participate in aggregation programs.

Throughout its application for rehearing, IEU repeatedly advances a false premise in support of its arguments. IEU claims (at 6) that the Opinion and Order "held that 'any customer located in a governmental aggregation community will qualify' for RPM-priced capacity." IEU cites to page 54 of the Opinion and Order for this quotation and again repeats the identical argument on page 8 and page 10. This interpretation of the Opinion and Order is misleading and contrived, in that it uses a highly selective and manipulated quotation that ignores the controlling language used in the Opinion and Order and in the Compliance Entry. While the Commission has to date unduly expanded the RPM set-aside to accommodate aggregation in AEP Ohio's view, there is no basis to assert (as IEU does) that the Commission provided unlimited access for aggregation communities to RPM-priced capacity.

IEU's repeated quotation of the Opinion and Order "any customer located in a governmental aggregation community will qualify" language materially omits the remainder of the sentence on page 54. The entire sentence reads:

> For these reasons, we find it necessary to modify the proposed Stipulation to adjust the RPM set-aside levels to accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011, election to ensure that any customer located in a governmental aggregation community will qualify for the RPM set aside, so long as the community or its CRES provider completes the necessary process to take service in the AEP-Ohio service territory by December 31, 2012.

(Opinion and Order at 54.) As one can glean from simply reading the entire sentence, the plain language used makes it clear that the Commission did not adopt an unqualified expansion of the RPM set-aside such that "any customer located in a governmental

aggregation community will qualify." First, the Commission's expansion was to "accommodate the load of any community that approved a governmental aggregation program in the November 8, 2011 election" and was limited to the load in those communities. Second, the Commission's expansion for those November ballot communities was conditioned on the communities or their CRES providers completing "the necessary process to take service in the AEP-Ohio service territory by December 31, 2012." Thus, IEU's repeated claim (at 6, 8 and 10) that the Opinion and Order "held that 'any customer located in a governmental aggregation community will qualify' for RPM-priced capacity" mischaracterizes the Commission's orders and is inaccurate. The Commission should not be drawn in by this tactic and most certainly should not reward IEU for employing it.

AEP Ohio demonstrated in its second application for rehearing that the incremental financial impact of adding pre-November communities to the aggregation set-aside is up to $130 million per year on AEP Ohio (if a projected impact is calculated, the impact is still substantial approximately $80 million). (*See* AEP Ohio February 10, 2012 Application for Rehearing at 3, 9.) Of course, adding post-November communities on top of that would cause additional unknown financial impact and additional uncertainty for AEP Ohio and its investors. Similarly, leaving the aggregation load open for longer than December 31, 2012 would cause additional unknown financial impact and additional uncertainty for AEP Ohio and its investors. As with the Commission's ill-advised decision to impose additional obligations on AEP Ohio in the Compliance Entry, it is unlawful and unreasonable for the Commission to impose obligations on the

Company without any record basis for doing so or any idea of what the financial impact on the Company would be.

In the same manner that a Commission would not blindly approve utility costs for collection from customers, the Commission should refrain from arbitrarily imposing costs on a utility without understanding the propriety, nature and extent of such costs. Yet, that is what IEU invites the Commission to do – expand remedies beyond the record and beyond the scope of the issues addressed in testimony and on brief. For example, the record does not reflect the load (or the costs associated with providing RPM-priced capacity to that load) associated with any post-November communities being added.

Section 4903.09, Revised Code, requires that, in all contested cases, the Commission must make a complete record of its proceedings and issue findings of fact and written opinions setting forth the reasons prompting its decisions, based upon those findings of fact. Where the Commission's order fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the Commission's order were based, the order fails to comply with the requirements of Section 4903.09, Revised Code, and is, therefore, unlawful. *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 5 (1974); *Allnet Comms. Serv. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209 (1994) (holding that the Commission must at least "suppl[y] some factual basis and reasoning based thereon in reaching the conclusion.") Stated differently, a "legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90 (1999). Similarly, the Court has categorically held that Commission orders which merely make summary rulings and conclusions without developing the supporting

rationale or record are reversed and remanded. *MCI Telecommunications,* 32 Ohio St.3d 306, 312.

The Supreme Court has only recently reversed the Commission for modifying a stipulation without sufficient explanation and record basis:

> In this matter, the commission made several modifications on rehearing without any reference to record evidence and without thoroughly explaining its reasons. *** The commission approved other modifications without citing evidence in the record and with very little explanation. The commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. The commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders.
>
> For these reasons, we hold that the commission failed to comply with the requirements of *R.C. 4903.09* when it modified its [entry on rehearing]. Accordingly, we remand this matter to the commission for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 309 (2006). Similarly, IEU has failed to demonstrate a basis in the record to support its proposals and the Commission would commit reversible error by not being able to support findings based on the record if it adopts IEU's proposals.

Beyond the foregoing reasons to reject IEU's application that are common to both grounds for rehearing, there are also separate additional reasons to reject the merits of each IEU argument.

B. Additional reasons not to include post-November communities in the aggregation set-aside

Other than its new-found affection for aggregation and its flawed interpretation of the Opinion and Order (see above), IEU presents no basis to support further expansion of

the aggregation set-aside. While AEP Ohio does not agree with the Opinion and Order's aggregation accommodation modification, it is obvious that the whole point of the Commission's change was to give communities access to RPM-priced capacity which may have relied on RPM being available when they actively pursued ballot initiatives for opt-out aggregation initiatives. This rationale does not apply to the post-November communities. By definition, there is no possibility that a community that did not yet take action has acted in reliance on the availability of RPM-priced capacity. In addition, opt-in aggregation could be done at any time under the normal set aside limits and would not require a modification of the Stipulation's set aside limits. There is no equitable reason to blindly expand the aggregation set-aside to include post-November communities.

C. Additional reasons to reject IEU's request to extend the December 31, 2012 deadline

Unlike IEU, AEP Ohio filed a *timely* application for rehearing regarding the Opinion and Order's December 31, 2012 deadline and maintained that it was unreasonable and without basis in the evidentiary record to hold the set-aside open until the end of 2012. (AEP Ohio January 13, 2012 Application for Rehearing at Prop. III.B.) AEP Ohio's argument demonstrated that the evidence of record did not support a 12-month extension for the aggregation communities to complete the process for serving customers. Those same considerations serve with greater force to undercut IEU's current request for even more time than the extra 12 months.

FES, whose championing of opt-out aggregation appears to be the basis for the Opinion and Order's year-long extension, only advocated for consideration of a 3-4 month process after the election for completing opt-out aggregation. Specifically, in his

testimony, FES witness Banks testified (after representing himself a being knowledgeable about the aggregation process) that it only takes 3-4 months after the election to enroll customers in an opt-out aggregation program. (FES Ex. 1 at 33; Tr. VII at 1265.) It is worth noting that FES's advocated time frame exceeds the estimate given by Constellation witness Fein who estimated that it would be a 2-4 month process to enroll customers after passage of the enabling legislation. (Tr. VI at 994-995.) Under Mr. Fein's estimate, the January 1 deadline would only need to be extended as little as two weeks until mid-January. But even accepting FES witness Banks' more generous portrayal of the time needed to complete opt-out aggregation, that estimate would only justify a delay from January 1 of 6-10 weeks – to either mid-February or mid-March 2012. Indeed, relying on this same evidence of record, FES explicitly suggested that customers in communities that adopted November 2011 ballot initiatives for opt-out aggregation could likely join the queue in February or March 2012. (FES Brief at 118.)

In any case, there simply is no record basis for the Opinion and Order's extension of a full year which is an extra 46-50 weeks, or up to 350 days longer than the deadline supported by evidence of record. The Opinion and Order's over-reaching remedy is particularly inappropriate given the resulting financial impact and uncertainty inflicted on AEP Ohio. Consequently, if the Commission does not eliminate the aggregation-related modification on rehearing, it should at least reduce the extension to a more realistic time period supported by record evidence – ranging from two additional weeks to two additional months from January 1, 2012.

In short, there is no basis for the Opinion and Order's decision to leave the aggregation set-aside open until the end of 2012 – let alone following IEU's overbroad

recommendation contained in its second application for rehearing (at 7) to apply the aggregation set-aside to all governmental aggregation programs "regardless of when they were or will be authorized and implemented, so long as the necessary process has been completed to take service from a CRES provider by December 31, 2012."

CONCLUSION

For the foregoing reasons, the Commission should deny IEU's February 17, 2012 application for rehearing.

Respectfully Submitted,

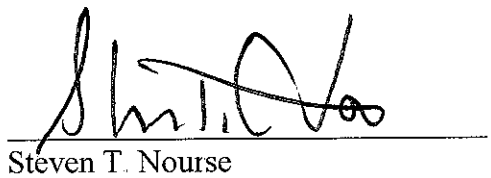
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2770
Fax: (614) 227-2100
dconway@porterwright.com

Counsel for Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Memorandum in Opposition has been served upon the below-named counsel and Attorney Examiners by electronic mail to all Parties this 21st day of February, 2012.



Steven T. Nourse

greta.see@puc.state.oh.us
jeff.jones@puc.state.oh.us
Daniel.Shields@puc.state.oh.us
Tammy.Turkenton@puc.state.oh.us
Jonathan.Tauber@puc.state.oh.us
"Bair, Jodi" <Jodi.Bair@puc.state.oh.us>
"Fortney, Bob" <Bob.Fortney@puc.state.oh.us>
"McCarter, Doris" <Doris.McCarter@puc.state.oh.us>
"Reilly, Stephen" <Stephen.Reilly@puc.state.oh.us>
dclark1@aep.com
grady@occ.state.oh.us
john.jones@puc.state.oh.us
keith.nusbaum@snrdenton.com
kpkreider@kmklaw.com
mjsatterwhite@aep.com
ned.ford@fuse.net
pfox@hilliardohio.gov
ricks@ohanet.org
rplawrence@aep.com
sfisk@nrdc.org
stnourse@aep.com
cathy@theoec.org,
joseph.dominquez@exeloncorp.com
dsullivan@nrdc.org
aehaedt@jonesday.com
dakutik@jonesday.com
haydenm@firstenergycorp.com
dconway@porterwright.com
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
etter@occ.state.oh.us

grady@occ.state.oh.us
small@occ.state.oh.us
cynthia.a.fonner@constellation.com
David.fein@constellation.com
Dorothy.corbett@duke-energy.com
Amy.spiller@duke-energy.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
ricks@ohanet.org
tobrien@bricker.com
jbentine@cwslaw.com
myurick@cwslaw.com
zkravitz@cwslaw.com
sfisk@nrdc.org
jejadwin@aep.com
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopoverty.org
todonnell@bricker.com
cmontgomery@bricker.com
lmcalister@bricker.com
mwarnock@bricker.com
Jesse.rodriguez@exeloncorp.com
gthomas@gtpowergroup.com
Wmassey@cov.com
henryeckhard@aol.com
kaurac@chappelleconsulting.net
whitt@carpenterlipps.com
sandy.grace@exeloncorp.com
cmiller@szd.com
ahaque@szd.com
gdunn@szd.com
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com
bakahn@vorys.com
gary.a.jeffries@aol.com
Stephen.chriss@wal-mart.com
kpkreider@kmlaw.com
dmeyer@kmklaw.com
holly@raysmithlaw.com
barthroyer@aol.com
Werner.Margard@puc.state.oh.us
William.Wright@puc.state.oh.us
Thomas.Lindgren@puc.state.oh.us
philip.sineneng@thompsonhine.com

carolyn.flahive@thompsonhine.com
terrance.mebane@thompsonhine.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
trent@theoeg.com
nolan@theoec.org
gpoulos@enernoc.com
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
clinton.vince@snrdenton.com
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com
jestes@skadden.com
paul.wright@skadden.com
dstahl@eimerstahl.com
aaragona@eimerstahl.com
ssolberg@eimerstahl.com
tsantarelli@elpc.org
callwein@wamenergylaw.com
malina@wexlerwalker.com
jkooper@hess.com
kguerry@hess.com
afreifeld@viridityenergy.com
swolfe@viridityenergy.com
korenergy@insight.rr.com

Case No(s). 10-2376-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

Summary: Memorandum in Opposition electronically filed by Mr. Steven T Nourse on behalf of American Electric Power Service Corporation