

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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MOTION TO STRIKE
INTERVENOR TESTIMONY AND MEMORANDUM IN SUPPORT OF
INDUSTRIAL ENERGY USERS-OHIO AND
OFFICE OF THE OHIO CONSUMERS' COUNSEL

Samuel C. Randazzo
(Counsel of Record)
Frank P. Darr
Joseph E. Olikar
Matthew R. Pritchard
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Maureen R. Grady, Counsel of Record
Terry L. Etter
Joseph P. Serio
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9567 - Grady
(614) 466-7964 - Etter
(614) 466-9565 - Serio
(614) 466-9475 (F)
grady@occ.state.oh.us
etter@occ.state.oh.us
serio@occ.state.oh.us

ON BEHALF OF INDUSTRIAL ENERGY
USERS-OHIO

ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL

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**MOTION TO STRIKE
INTERVENOR TESTIMONY OF INDUSTRIAL ENERGY USERS-OHIO
AND OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Rule 4901-1-27(B)(7), Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") moves the Public Utilities Commission of Ohio ("Commission") for an order striking the following portions of the prefiled testimony of Lane Kollen and David Fein:

Testimony of Lane Kollen

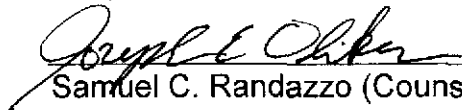
- 1) Page 5, line 1 to line 11;
- 2) Page 8, line 1 to page 11, line 22; and
- 3) Page 16, line 8 to page 17, line 13.

Prefiled testimony of David Fein

- 1) Page 9, lines 8 to line 18;
- 2) Page 13, Lines 12 through 15.

The reasons supporting the Motion to Strike are set out in the accompanying memorandum.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Olikar

Matthew R. Pritchard

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

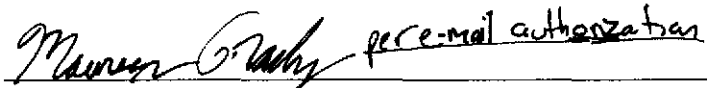
sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO



Maureen R. Grady, Counsel of Record

Terry L. Etter

Joseph P. Serio

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-9567 - Grady

(614) 466-7964 - Etter

(614) 466-9565 - Serio

(614) 466-9475 (F)

grady@occ.state.oh.us

etter@occ.state.oh.us

serio@occ.state.oh.us

**ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Rule 4901-1-27(B)(7), Ohio Administrative Code ("OAC"), authorizes the attorney examiner presiding over a hearing to "[t]ake such actions as are necessary to: (a) Avoid unnecessary delay [and] (b) Prevent the presentation of irrelevant or cumulative evidence." Because the prefiled testimony of Lane Kollen and David Fein contain matters that should not be included in the record of this proceeding, the Attorney Examiners should grant this Motion to Strike portions of their prefiled testimony.

II. ARGUMENT

A. The Testimony of Lane Kollen Contains Portions that Are Irrelevant and Which Should Be Stricken.

Relevant evidence is that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.”¹ Applying the standard of relevance to prefiled testimony, the Commission has stricken testimony that it has determined as irrelevant. For example, Attorney Examiners recently struck the prefiled testimony of an intervenor solely on the basis that it was not relevant in the Commission’s review of the capacity charges of Ohio Power Company (“OP”).²

Lane Kollen, on behalf of the Ohio Energy Group (“OEG”), provides prefiled testimony that OP should be authorized to implement an Equity Stability Mechanism (“ESM”). The proposed ESM would provide a “minimum return on equity to safeguard the Company and a maximum return on equity to safeguard customers so that the state compensation mechanism is not confiscatory on the one hand or overly compensatory on the other.”³ The “goal” would be accomplished by Commission approval of a non-bypassable charge that would allow the electric distribution utility (“EDU”) to raise rates

¹ R. Evid. 401.

² *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, Hearing Transcript, Vol. I at 17 (testimony of Vincent Parisi (Apr. 17, 2012)). See also *In the Matter of the Application of Verizon Wireless for Arbitration of an Interconnection Agreement with SBC Ohio*, Case No. 03-515-TP-ARB, Arbitration Award at 4 (Nov. 13, 2003), (holding that “evidence is irrelevant in any case, as the Commission determines in this opinion and order that the activities of SBC’s affiliate in Michigan are not relevant to any finding of discrimination in Ohio”); see also *In the Matter of the Petition of TDS MetroCom, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio*, Case No. 02-1254-TP-ARB, Entry at 2 (Sept. 27, 2002), (holding that comments should be stricken as they were outside the scope of the proceeding and did not assist the Commission in determining the issues presented in the proceeding); see also *In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TP-ACO, Entry at 5-6 (Aug. 3, 2005), (holding that testimony addressing issues outside the proceeding should be stricken); see also *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison 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. 10-388-EL-SSO, Opinion and Order at 19 (Aug. 25, 2010), (granting IEU-Ohio’s Motion to Strike portions of witness testimony not probative to an application filed pursuant to Section 4928.141, Revised Code); *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, Finding and Order at ¶ 32 (Jan. 23, 2012) (OCC filed a motion to strike portions of comments and reply comments based on commenters’ reliance on the Duke ESP stipulation. The Commission granted that motion, in part.)

³ Prefiled Testimony of Lane Kollen at 8.

if its earnings fell below seven percent and a customer credit if the EDU's earnings exceeded eleven percent.⁴ The rider would continue only so long as the EDU retained ownership of generation.⁵ The EDU would be guaranteed a return until such time as the generation assets are removed from the balance sheet of the EDU. The testimony concerning the ESM is at the following pages and lines:

- 1) Page 5, line 1 to line 11;
- 2) Page 8, line 1 to page 11, line 22; and
- 3) Page 16, line 8 to page 17, line 13.

Like the Rate Stabilization Rider proposed by OP, it is an example of a recovery of transition revenues that is not permitted by Ohio law. As noted by many of the Intervenor and OP itself in its application to transfer assets,⁶ Section 4928.141(A), Revised Code, specifically precludes the continuation of any transition cost recovery, and Section 4928.38, Revised Code, makes it illegal for the Commission to authorize continued generation transition cost recovery outside the market development period.

Because the ESM seeks to establish a transition cost recovery mechanism that is outside the authority of the Commission, it is not relevant to this proceeding. As noted above, the Commission has regularly and correctly stricken testimony that is not

⁴ *Id.*

⁵ *Id.* at 10.

⁶ In the *Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Application at 7 (Mar. 30, 2012).

relevant. Based on that precedent, the Commission should strike the portions of Mr. Kollen's testimony regarding the ESM.

B. References to the Duke ESP Stipulation

The Attorney Examiner should strike testimony which relies on the stipulation and recommendation submitted in Duke Energy Ohio's electric security plan ("ESP") case.⁷ The *Duke ESP Stipulation* provides in relevant part that it shall not be used in any other proceeding for any purpose other than enforcement of its terms.⁸ The Stipulation reflects agreement to a package—it does not reflect agreement to a single isolated provision.⁹ Accordingly, the *Duke ESP Stipulation* cannot be relied upon in this proceeding.

At two places in his prefiled testimony, Mr. Fein, testifying on behalf of Constellation New Energy, Inc., Constellation Energy Commodities Group (collectively "Constellation"), Exelon Energy Company, and Exelon Generation Company (collectively "Exelon"), offers or relies upon the Duke ESP Stipulation:

- 1) Page 9, lines 8 to line 18;
- 2) Page 13, Lines 12 through 15.

In the first reference, Mr. Fein uses the *Duke ESP Stipulation* to contrast OP's Rate Stability Rider with a "transitory mechanism" contained in the *Stipulation*. In the second

⁷ *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, et al., Stipulation and Recommendation at 2 (Oct. 24, 2011) (hereinafter "*Duke ESP Stipulation*").

⁸ The *Duke ESP Stipulation* states, "This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation nor any Commission Order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon in any other proceedings, except as necessary to enforce the terms of this Stipulation." *Id.*

⁹ *Id.*

reference, Mr. Fein offers that OP is entitled to a "fair transitional payment ... consistent with PUCO treatment of other EDUs such as Duke Energy Ohio," a clear reference to the "transitory mechanism" identified in the first reference. The second reference is offered or relied upon to support a rate mechanism. Both references violate the terms of the Stipulation which Constellation and Exelon signed and should be stricken as a violation of the terms of the Stipulation.

III. CONCLUSION

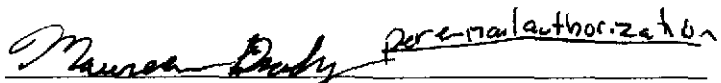
For the reasons outlined above, the Commission should grant this Motion to Strike portions of the testimony of Lane Kollen and David Fein.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Olier
Matthew R. Pritchard
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215

ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO



Maureen R. Grady, Counsel of Record
Terry L. Etter
Joseph P. Serio
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Strike Intervenor Testimony and Memorandum in Support of Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel* was served upon the following parties of record this 11th day of May 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


Joseph E. Olicker

Matthew J. Satterwhite
Steven T. Nourse
Anne M. Vogel
Yazen Alami
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com
yalami@aep.com

Daniel R. Conway
Christen M. Moore
Porter Wright Morris & Arthur
41 S. High Street
Columbus, OH 43215
dconway@porterwright.com
cmoore@porterwright.com

**ON BEHALF OF COLUMBUS SOUTHERN POWER
COMPANY AND OHIO POWER COMPANY**

Dorothy K. Corbett
Amy B. Spiller
Jeanne W. Kingery
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Dorothy.Corbett@duke-energy.com
Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com

**ON BEHALF OF DUKE ENERGY RETAIL SALES, LLC
AND DUKE ENERGY COMMERCIAL ASSET
MANAGEMENT, INC.**

Robert A. McMahon
Eberly McMahon LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206

Rocco D'Ascenzo
Elisabeth Watts
Duke Energy Ohio, Inc.
139 East Fourth Street - 1303-Main
Cincinnati, OH 45202
Elisabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com

ON BEHALF OF DUKE ENERGY OHIO, INC.

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

ON BEHALF OF THE OHIO ENERGY GROUP

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

ON BEHALF OF ENERNOC, INC.

Kyle L. Kern
Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad Street, 18th Floor
Columbus, OH 43215-3485
kern@occ.state.oh.us
etter@occ.state.oh.us
grady@occ.state.oh.us

**ON BEHALF OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

Richard L. Sites
General Counsel & Senior Director of Health
Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

OH BEHALF OF OHIO HOSPITAL ASSOCIATION

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

ON BEHALF OF THE KROGER CO.

Terrence O'Donnell
Christopher Montgomery
Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com
mwarnock@bricker.com

ON BEHALF OF PAULDING WIND FARM II LLC

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

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

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

Allison E. Haedt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
aehaedt@jonesday.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

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

**ON BEHALF OF THE APPALACHIAN PEACE AND
JUSTICE NETWORK**

Lisa G. McAlister
J. Thomas Siwo
Thomas O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
lmcaster@bricker.com
tsiwo@bricker.com
tobrien@bricker.com

ON BEHALF OF OMA ENERGY GROUP

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

**ON BEHALF OF AEP RETAIL ENERGY PARTNERS
LLC**

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpeticoff@vorys.com
smhoward@vorys.com

**ON BEHALF OF PJM POWER PROVIDERS GROUP
AND THE RETAIL ENERGY SUPPLY ASSOCIATION**

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

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

ON BEHALF OF PJM POWER PROVIDERS GROUP

M. Howard Petricoff
Michael Settineri
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, OH 43215-1008
mhpeticoff@vorys.com
mjsettineri@vorys.com

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

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

ON BEHALF OF THE COMPETE COALITION

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
callwein@williamsandmoser.com

**ON BEHALF OF THE NATURAL RESOURCES
DEFENSE COUNCIL AND THE SIERRA CLUB**

M. Howard Petricoff
Michael J. Settineri
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpeticoff@vorys.com
mjsettineri@vorys.com
smhoward@vorys.com

**ON BEHALF OF CONSTELLATION NEWENERGY,
INC., CONSTELLATION ENERGY COMMODITIES
GROUP, INC., DIRECT ENERGY SERVICES, LLC**

Gary A Jeffries
Assistant General Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
Gary.A.Jeffries@aol.com

ON BEHALF OF DOMINION RETAIL, INC.

David I. Fein
Vice President, Energy Policy – Midwest
Constellation Energy Group, Inc.
Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 West Washington Blvd., Suite 300
Chicago, IL 60661
david.fein@constellation.com
cynthia.brady@constellation.com

**ON BEHALF OF CONSTELLATION NEWENERGY, INC.
AND CONSTELLATION ENERGY COMMODITIES
GROUP, INC.**

Jeanine Amid Hummer
Thomas K. Lindsey
City of Upper Arlington
C. Todd Jones,
Christopher L. Miller,
Gregory H. Dunn
Asim Z. Haque
Ice Miller LLC
250 West Street
Columbus, OH 43215
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
asim.haque@icemiller.com
jhummer@uaoh.net
tlindsey@uaoh.net

**ON BEHALF OF THE CITY OF GROVE CITY, OHIO
AND THE ASSOCIATION OF INDEPENDENT COLLEGES
AND UNIVERSITIES OF OHIO, THE CITY OF UPPER
ARLINGTON, THE CITY OF HILLSBORO, OHIO**

Sandy Iru Grace
Assistant General Counsel
Exelon Business Services Company
101 Constitution Ave., NW
Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street/P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com

David M. Stahl
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com

**ON BEHALF OF EXELON GENERATION COMPANY,
LLC**

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com
Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115

holly@raysmithlaw.com

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
Bentonville, AR 72716-0550
Stephen.Chriss@wal-mart.com

**ON BEHALF OF WAL-MART STORES EAST, LP AND
SAM'S EAST, INC.**

Barth E. Royer (Counsel of Record)
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
BarthRoyer@aol.com

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

**ON BEHALF OF THE ENVIRONMENTAL LAW &
POLICY CENTER**

Nolan Moser
Trent A. Dougherty
Camille Yancy
Cathryn Loucas
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
nolan@theoec.org
trent@theoec.org
camille@theoec.org
cathy@theoec.org

**ON BEHALF OF THE OHIO ENVIRONMENTAL
COUNCIL**

Robert Korandovich
KOREnergy
P.O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

ON BEHALF OF KOREENERGY

Douglas G. Bonner
Emma F. Hand
Keith C. Nusbaum
Clinton A. Vince
Daniel D. Barnowski
James Rubin
Thomas Millar
SNR Denton US LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
doug.bonner@snrdenton.com
emma.hand@snrdenton.com
keith.nusbaum@snrdenton.com
clinton.vince@snrdenton.com
daniel.barnowski@snrdenton.com
james.rubin@snrdenton.com
thomas.millar@snrdenton.com

Arthur Beeman
SNR Denton US LLP
525 Market Street, 26th Floor
San Francisco, CA 941-5-2708
arthur.beeman@snrdenton.com

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

ON BEHALF OF HESS CORPORATION

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Jacqueline Lake Roberts,
Counsel of Record
101 Federal Street, Suite 1100
Boston, MA 02110
jroberts@enernoc.com

ON BEHALF OF CPOWER, INC., VIRIDITY ENERGY, INC., ENERGYCONNECT INC., COMVERGE INC., ENERWISE GLOBAL TECHNOLOGIES, INC., AND ENERGY CURTAILMENT SPECIALISTS, INC.

Benita Kahn
Lija Kaleps-Clark
Vorys Sater, Seymour and Pease LLC
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
bakahn@vorys.com
lkalepsclark@vorys.com

ON BEHALF OF OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

Mark A. Whitt
Melissa L. Thompson
Whitt Sturtevant LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, OH 43215
whit@whitt-sturtevant.com
thompson@whitt-sturtevant.com

Vincent Parisi
Matthew White
Interstate Gas Supply, Inc.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

ON BEHALF OF INTERSTATE GAS SUPPLY, INC.

Dane Stinson
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ON BEHALF OF THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, THE OHIO SCHOOL BOARDS ASSOCIATION, THE OHIO SCHOOLS COUNCIL AND THE BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS

Chad A. Endsley
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218-2383
cendsley@ofbf.org.

ON BEHALF OF THE OHIO FARM BUREAU FEDERATION

Brian P. Barger
Brady, Coyle & Schmidt, LTD
4052 Holland-Sylvania Rd.
Toledo, OH 43623
bpbarger@bcslawyers.com

**ON BEHALF OF THE OHIO CONSTRUCTION
MATERIALS COALITION**

Diem N. Kaelber
Robert J Walter
10 West Broad Street, Suite 1300
Columbus, OH 43215
kaelber@buckleyking.com
walter@buckleyking.com

ON BEHALF OF OHIO RESTAURANT ASSOCIATION

Judi L. Sobecki
Randall V. Griffin
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com

**ON BEHALF OF THE DAYTON POWER AND LIGHT
COMPANY**

Sara Reich Bruce
Ohio Automobile Dealers Association
655 Metro Place South, Suite 270
Dublin, OH 43017
sbruce@oada.com

**ON BEHALF OF THE OHIO AUTOMOBILE DEALERS
ASSOCIATION**

Joseph M. Clark
Direct Energy Services LLC
And Direct Energy Business LLC
6641 North High Street, Suite 200
Worthington, OH 43085
jmclark@vectren.com

**ON BEHALF OF DIRECT ENERGY SERVICES, LLC
AND DIRECT ENERGY BUSINESS, LLC**

Todd M. Williams
Williams Allwein and Moser, LLC
Two Maritime Plaza-Third Floor
Toledo, OH 43604
toddm@wamenergylaw.com

**ON BEHALF OF THE OHIO BUSINESS COUNCIL FOR
A CLEAN ECONOMY**

Matthew R. Cox
Matthew Cox Law, Ltd.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

**ON BEHALF OF THE COUNCIL OF SMALLER
ENTERPRISES (COSE)**

Carolyn S. Flahive
Stephanie M. Chmiel
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Carolyn.Flahive@ThompsonHine.com
Stephanie.Chmiel@ThompsonHine.com

**ON BEHALF OF BORDER ENERGY ELECTRIC
SERVICES, INC.**

Randy J. Hart
Rob Remington
David J. Michalski
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
rhart@hahnlaw.com
rrremington@hahnlaw.com
djnichalski@hahnlaw.com

**ON BEHALF OF SUMMIT ETHANOL, LLC AND
FOSTORIA ETHANOL, LLC**

Robert Burke
Braith Kelly
Competitive Power Ventures, Inc.
8403 Colesville Road, Ste. 915
Silver Spring, MD 20910
rburke@cpv.com
bkelly@cpv.com

Larry F. Eisenstat
(Counsel of Record)
Richard Lehfeltdt
Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com

ON BEHALF OF CPV POWER DEVELOPMENT, INC.

Robert L. Kinder, Jr.
Dickstein Shapiro LLP
1825 Eye St. NW
Washington, DC 20006
kinder@DicksteinShapiro.com

ON BEHALF OF CPV POWER DEVELOPMENT, INC.

Jack D'Aurora
The Behal Law Group LLC
501 South High Street
Columbus, OH 43215
jdaurora@behallaw.com

ON BEHALF OF THE UNIVERSITY OF TOLEDO

Roger P. Sugarman
Kegler, Brown, Hill & Ritter
65 East State Street, Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

ON BEHALF OF NFIB/OHIO

William Wright
Werner Margard
Thomas Lindgren
John H. Jones
Assistant Attorneys' General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
william.wright@puc.state.oh.us

**ON BEHALF OF THE PUBLIC UTILITIES COMMISSION
OF OHIO**

Greta See
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINERS