

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review)	
of the Capacity Charges of Ohio Power)	Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)	
Company.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-346-EL-SSO
Ohio Power Company for Authority to)	Case No. 11-348-EL-SSO
Establish a Standard Service Offer)	
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**MEMORANDUM CONTRA OHIO POWER COMPANY'S MOTION FOR
CONSOLIDATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE J. WESTON
CONSUMERS' COUNSEL

Kyle L. Kern, Counsel of Record
Melissa R. Yost
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
614-466-1291 (Yost Telephone)
kern@occ.state.oh.us
yost@occ.state.oh.us

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I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of the approximately 1.2 million residential utility customers of Ohio Power Company (the “Utility” or “AEP-Ohio”), submits this Memorandum Contra Ohio Power’s Motion for Consolidation (“Motion for Consolidation”) pursuant to Ohio Admin Code. 4901-1-12(B)(1).

On September 11, 2012, AEP-Ohio filed a Motion to Consolidate Case Nos. 11-346-EL-SSO et al. (AEP-Ohio “AEP ESP” proceeding) and Case No. 10-2929-EL-UNC (the “Capacity Charge Case”).

AEP-Ohio specifically seeks to consolidate the cases “for purposes of deciding, on an integrated basis, the issues raised on rehearing in both cases, on an integrated basis.”¹ AEP-Ohio urges the Commission to issue a consolidated rehearing decision in both cases. Under AEP-Ohio’s approach the record from the Capacity proceeding would be “available” along with the ESP II proceedings record to “support a single rehearing order from the Commission.”² AEP-Ohio reasons that the PUCO has the authority to do so under R.C. 4901.13 and that there are logical and reasonable bases for doing so.³ This request, which obviously seeks to bootstrap belated record support into the decisions of the Commission—despite the real history of the cases that the record support was not available when the orders were issued—should be denied. We will explain below.

II. PROCEDURAL BACKGROUND

The Commission opened the Capacity Charge Case docket on December 7, 2010, and on December 8, 2010, the PUCO found that an investigation was necessary in order to determine the impact of the changes that AEP-Ohio sought to initiate to its capacity charges.⁴ The Commission sought comments regarding several issues related to the Utility’s capacity charges.⁵ On August 11, 2011, after considering comments and reply comments, the PUCO set the matter for hearing beginning in October 2011.⁶

¹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case Nos. 10-2929, et al., Motion for Consolidation at 1 (September 11, 2012) (“Capacity Charge Case”).

² *Id.* at 6.

³ *Id.* at 1.

⁴ AEP Ohio filed at the Federal Energy Regulatory Commission to change the basis for its compensation for capacity costs from RPM to a cost based mechanism. See FERC Docket No. EL11-32.

⁵ Capacity Charge Case, Entry (Dec. 8, 2010).

⁶ Entry (August 11, 2011).

In the meantime, AEP-Ohio filed an application for a standard service offer (“SSO”) pursuant to Section 4928.141, which was docketed as Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, and 11-350-EL-AAM on January 27, 2011. On September 7, 2011, the Utility, Commission Staff, and various intervenors⁷ filed a Stipulation and Recommendation purporting to resolve all issues in **both** the AEP ESP and Capacity Charge proceedings.⁸ The Capacity Charge Case was consolidated with several other AEP-Ohio proceedings, including the AEP ESP, for the purpose of holding a hearing to consider the Stipulation on September 16, 2011.⁹ The Entry also stayed the procedural schedule in the Capacity Charge Case until the PUCO specifically ordered otherwise. The evidentiary hearing on the AEP ESP Stipulation was held in October 2011, and the Commission issued its Opinion and Order in that proceeding, adopting, with modifications the Stipulation on December 14, 2011.

Ultimately, after various parties filed Applications for Rehearing, the Commission found that certain provisions of the Stipulation did not benefit customers and the public interest, and consequently rejected the Stipulation.¹⁰ The Entry on Rehearing directed that the AEP ESP proceeding go forward from the point at which the Stipulation was filed.¹¹ The PUCO also instructed the Attorney Examiners to establish a separate procedural schedule in the Capacity Charge Case. On March 14, 2012 an Entry was

⁷ OCC was not a signatory party to this Stipulation.

⁸ See Stipulation and Recommendation (September 7, 2011).

⁹ Case No. 11-346-EL-SSO, Entry (September 16, 2011).

¹⁰ Id., Entry on Rehearing (February 23, 2012).

¹¹ Id at ¶21.

issued establishing a procedural schedule for the Capacity Charge Case.¹² Accordingly, an evidentiary hearing was held in April, 2012, and concluded in May, 2012.

The PUCO issued an Opinion and Order in the Capacity Charge Case on July 2, 2012. But in that Opinion and Order (“July 2 Order”), the Commission declared that it would address in a separate case (the AEP ESP case) a mechanism for collecting the capacity charge deferrals it created in the July 2 Order.¹³ Various parties filed Applications for Rehearing of the Commission’s July 2 Order, and on August 15, 2012, the Commission granted the Applications for Rehearing for purposes of further consideration.¹⁴

On August 8, 2012, the PUCO issued an Opinion and Order in the AEP ESP proceeding. Parties filed applications for rehearing in the AEP ESP case on September 7, 2012. Months after these separate cases were litigated, after post-hearing briefs were submitted, and after Applications for Rehearing were filed, AEP-Ohio has filed a Motion to Consolidate the Capacity Charge Case and AEP ESP for purposes of considering applications for rehearing.

III. ARGUMENT

A. The PUCO Should Reject AEP-Ohio’s Motion Because It Is Vague, Unclear, Contrary to R.C. 4903.09 and 4903.10, Does Not Promote Judicial Economy, And Denies Parties Due Process.

The Utility makes the request to consolidate the Capacity Charge Case and the AEP ESP proceeding for “purposes of deciding, on an integrated basis, the issues raised

¹² Case No. 10-2929-EL-UNC, Entry (March 14, 2012).

¹³ Id., Opinion and Order (July 2, 2012).

¹⁴ Id., Entry (August 15, 2012).

on rehearing in both cases.”¹⁵ The Utility’s request is clearly and self-servingly aimed at “improve[ing] the record basis for the findings relied upon in the decision” and reinforcing support for the PUCO’s decisions in both cases.¹⁶ However, it is unclear from the Motion what the Utility’s request specifically entails. For instance what does consolidation of decision making mean in the context of two cases with separate records? And what does making the Capacity Charge Case record “available” along with the AEP ESP II proceeding’s record for rehearing entail? Because of the vague nature of the request alone, the Commission should deny the motion. But there are other more compelling reasons to deny the Utility’s Motion to Consolidate.

Under R.C. 4903.09, the Commission must base its orders on the findings of fact specific to the record of the case. The PUCO in order to meet the requirements of the statute, must show in sufficient detail, “the facts *in the record* upon which the order is based” and the reasoning followed.¹⁷ The record of the case cannot be changed at this late stage to provide a better basis for the Commission’s original decisions or its decisions on rehearing. Doing so would circumvent the requirements of R.C. 4903.09. And, if the Commission does grant rehearing, R.C. 4903.10, prohibits it from taking any evidence that, with reasonable diligence, could have been offered upon the original hearing. In other words, evidence — making the records of both proceedings “available” for purposes of a single Entry on Rehearing — cannot be offered unless the Utility shows that such evidence could not have been offered upon the original hearing. It has made no such showing here. Indeed, what AEP-Ohio seems intent upon masking is that others,

¹⁵ Id., Motion for Consolidation at 1 (September 11, 2012).

¹⁶ Id. at 3 and 4.

¹⁷ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306.

such as OCC, were denied the opportunity to make a record for critical decisions that the PUCO made when ruling.

Moreover, it would be unreasonable for the PUCO to consolidate these proceedings at the very final stages (i.e., when ruling on applications for rehearing). The rehearing process affords parties the ability to challenge “any matters determined in the proceeding.”¹⁸ The matters determined in the proceedings to date, are based upon the record that was before the Commission in each case. What the Utility seeks to do here is supplement the record in each case to provide more support for the original Opinion and Order, which is being challenged by the applications on rehearing. But as discussed above, the original Opinion and Order must stand on the record that was before it; neither the Commission nor the utility can after the fact change the record in order to validate the PUCO’s decision under R.C. 4903.09.

Regardless of the intent of the Utility’s Motion, Ohio Civ. R. 42(A) mandates that in order to consolidate actions there must be “a common question of law or fact.” If there is such a common question, a court, or the Commission as is the case here, should weigh the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice consolidation might cause.

There was not a common question of law or fact between the Capacity Charge Case and the AEP ESP case *until* the point in which Commission issued its July 2 Order in the Capacity Charge Case. In fact, the Commission set forth the narrow scope of the Capacity Charge Proceeding in its December 8, Entry. The PUCO specifically sought comments on the following issues: “(1) what changes to the current state mechanism are appropriate to determine the Companies’ fixed resource requirement capacity charges to

¹⁸ See R.C. 4903.10

Ohio competitive retail electric service (CRES) providers; (2) the degree to which AEP-Ohio's capacity charges are currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charges upon CRES providers and retail competition in Ohio.” And in the Entry of March 14, 2012, the Attorney Examiner established a procedural schedule for purposes of “establishing an evidentiary record on a state compensation mechanism.” In contrast, the specific function of the AEP ESP proceeding was for PUCO approval of AEP-Ohio's proposed Electric Security Plan.

The Ohio Supreme Court has held that the purpose of Ohio Civ. R. 42(A) is “to avoid unnecessary costs of delay in the interests of judicial economy.”¹⁹ This rationale is not applicable here as the cases in question have already been fully litigated separately. The time to avoid the possible duplication of work and undue delay has long passed. Judicial economy will not be served by joining these separate cases at this late stage.

Further, consolidating the cases for purposes of addressing applications for rehearing denies parties their due process rights. In this regard, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews, Sec’y of Health, Education, and Welfare v. Eldridge* (1976), 424 U.S. 319, 333 (quoting *Armstrong v. Manzo* (1965), 380 U.S. 545, 552).

The parties to the Capacity Charge Case and AEP ESP proceedings were not afforded the opportunity to litigate these cases jointly. The hearings for these cases were separate and distinct. Separate expert testimony and evidence was presented in each case. Separate initial and reply briefs were filed in each case. The issues were distinct for each

¹⁹ *Dir. of Highways v. Kleines*, 38 Ohio St. 2d 317 (Ohio 1974) at 2.

proceeding, and the legal counsel, parties and witnesses were not all identical for each proceeding. As a result, the parties to the AEP ESP case did not have the opportunity to address the issues presented in the Capacity Charge Case in the AEP ESP proceeding, and vice versa. Accordingly, it is unfair to the parties to consolidate the cases now, when there are no opportunities to argue the cases as one consolidated case.

Finally, if the Utility is requesting that the records for both cases be consolidated for purposes of considering applications for rehearing, the request is problematic. In the recent FirstEnergy ESP 3 Case, FirstEnergy requested the Commission to take administrative notice of the entire record of the proceedings from the FirstEnergy's ESP 2 Case. The request was addressed by the Attorney Examiner as follows:

MR. KUTIK: Your Honor, before we call our first witness, the companies in their application indicated that they intended to incorporate the record of the 10-388 case, the ESP III case -- ESP II case. At this time, your Honor, we ask the Commission take administrative notice of the record of the 10-388 case.

EXAMINER PRICE: Any objection?

MR. McNAMEE: None.

EXAMINER PRICE: I have to admit, I know this was pending, but I'm concerned that it's not -- you don't have a list of specific documents? You just want the entire record?

* * *

EXAMINER PRICE: I am -- I am uncomfortable incorporating wholesale the entire record from 10-388. If you have a document-by-document request for

administrative notice of matters in 10-388, please make it then, and I'm sure that administrative notice will be liberally taken.²⁰

In response to the Attorney Examiner's directive, FirstEnergy provided a specific list of items that constituted the materials that the Companies requested for administrative notice by the Commission.²¹ Subsequently, the Commission granted FirstEnergy's request.²² Thus, the Commission did not support the incorporation of an entire record from one proceeding into another. It should not do so in this case.

B. It Is Too Late For AEP-Ohio To Cure The Evidentiary Problem Caused By The Commission's July 2 Opinion And Order In The Capacity Charge Case.

In the Capacity Charge Order, the Commission linked the Capacity Charge Case with the AEP ESP case when it authorized the deferral of certain capacity costs and indicated it would "establish the appropriate recovery mechanism for such deferred costs [capacity costs] and address any additional financial considerations in the 11-346 proceeding."²³ But the primary capacity-related issue in the AEP ESP proceeding was the Utility's alleged or claimed discounts for capacity (i.e., the two-tiered pricing scheme for capacity and the alternative \$10/MWh shopping credit) from the Utility's proposed \$355/MW-day capacity price. A proposed collection mechanism was not a subject of the AEP ESP proceeding

Further, the appropriate mechanism for collecting any capacity cost deferrals was not placed in issue by AEP-Ohio's application, by the PUCO staff or by the parties in the

²⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide For a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Tr. Vol. I at 26-29 (June 4, 2012). Emphasis added.

²¹ Id. at Tr. Vol. III at 10-12 (August 6, 2012).

²² Id. at 170-171.

²³ Case No. 10-2929-EL-UNC, Opinion and Order, at 23 (July 2, 2012).

AEP ESP proceeding. There was no evidence presented in the AEP ESP proceeding related to the appropriate mechanism for collecting these deferrals established in the present case. This was because the deferrals did not exist until the Commission created them in the Capacity Charge Case, in its July 2, 2012 Order. At that time, AEP-Ohio's ESP proceeding was in the reply brief stage, making it impossible to have a record basis to fashion a mechanism for recovery of the deferrals.

Accordingly, the Commission did not have any record, let alone a complete record, in the AEP ESP case on which it could appropriately determine how such capacity cost deferrals could or should be treated. But that is precisely what the Commission did in the July 2 Capacity Order.

The capacity charge matter was thrust into the AEP ESP proceeding with no warning and no opportunity for parties to address the appropriate mechanism for collections. And now, AEP-Ohio argues in its Motion for Consolidation "... portions of the decision in each respective case rely on portions of the decision from the other case, including the record."²⁴ While the Utility's observation is accurate, the evidentiary issues caused by the July 2 Capacity Charge Order cannot be cured at this late stage by consolidating the cases.

The Utility argues that "[a] consolidated approach for a rehearing decision would advance a more comprehensive explanation and understanding of the Commission's decisions and would, thus, reinforce the support for the Commission's decisions."²⁵ But OCC submits that a consolidated approach at this late stage is unlawful and will only cause further evidentiary complexities, confusion and prejudice. The records for each

²⁴ Motion for Consolidation at 3 (September 11, 2012).

²⁵ Id. at 5.

case are separate. The evidence presented in each case was separate. The briefs for each case are separate.

The decisions of the Commission must be based solely on the record before them, which was not a consolidated record. Separate applications for rehearing have already been made.

C. The Commission Should Reject The Utility’s Request Because It Denied OCC and Appalachian Peace and Justice Network’s Request To Take Administrative Notice In The AEP ESP Proceeding.

On July 20, 2012, OCC the Appalachian Peace and Justice Network (“APJN”) filed a motion in the AEP ESP proceeding to take administrative notice of several items contained within the record of the Capacity Charge Case.²⁶ OCC and APJN generally submitted that the record in the AEP ESP case should be expanded to include these materials in order to have a more thorough record on issues pertaining to customer rates.

But in response to OCC and APJN’s Motion, AEP-Ohio complained that OCC and APJN improperly sought to add documents into the record at the **late stage** of the proceeding.²⁷ In addition, AEP-Ohio submitted that OCC and APJN’s request was inappropriate and unnecessary as there were no further actions to these proceedings except the Commission opinion and order and rehearing.²⁸ Specifically, the Utility said “[t]he time for procedural maneuvers and argumentation is now complete and the record is in the hands of the Commission for determination.”²⁹

²⁶ Case No. 11-246-EL-SSO, et al., Motion For Administrative Notice (July 20, 2012).

²⁷ Id. Ohio Power Memorandum Contra, (July 24, 2012) at 22. (Emphasis added).

²⁸ Id.

²⁹ Id. at 2.

The Commission ultimately ruled that OCC and APJN's motion to take administrative notice should be denied. The PUCO found that the timing of OCC and APJN's request was problematic.³⁰

If the timing of OCC and APJN's request was problematic on July 20, 2012, and OCC and APJN only requested administrative notice of certain facts from the Capacity Charge Case, then the timing of AEP-Ohio's Motion for Consolidation is extremely troublesome. First, under R.C. 4901.13, "the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort."³¹ The PUCO could have used its broad discretion³² in the conduct of its hearings to consolidate the proceedings, but it did not.

Second, the Utility also made the point in its Memorandum Contra that OCC and APJN's Motion for Administrative Notice should be denied because there were "no opportunit[ies] for opposing parties to test that additional evidence."³³ Again, the same argument can be made here. It is improper to consolidate two separate proceedings when there are no opportunities for parties to argue the cases as one consolidated case.

Finally, and to use the words of the Utility, "[t]he time for procedural maneuvers and argumentation is now complete and the record is in the hands of the Commission for determination." The applications for rehearing for these separate proceedings are before

³⁰ Opinion and Order at 12-13(August 1, 2012).

³¹ *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560, 23 Ohio Op. 3d 474, 475, 433 N.E.2d 212, 214.

³² *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 10 Ohio Op. 3d 493, 500, 384 N.E.2d 264, 273.

³³ *Id.* at 3.

the Commission awaiting its determinations. In the interest of fairness, and to avoid any further confusion, the Commission should deny AEP-Ohio's Motion for Consolidation.

IV. CONCLUSION

For the reasons articulated herein, the Commission should deny the Utility's Motion for Consolidation of the Capacity Charge case and the AEP ESP proceeding.

Respectfully submitted,

BRUCE J. WESTON
OHIOCONSUMERS' COUNSEL

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record
Melissa R. Yost
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
614-466-1291 (Yost Telephone)
kern@occ.state.oh.us
yost@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of OCC's Memorandum Contra was served on the persons stated below via electronic transmission, this 17th day of September, 2012.

/s/ Kyle L. Kern

Kyle L. Kern

Assistant Consumers' Counsel

SERVICE LIST – 10-2929-EL-UNC

Thomas.lindgren@puc.state.oh.us
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
haydenm@firstenergycorp.com
Paul.Wight@skadden.com
John.Estes@skadden.com
cendsley@ofbf.org
Amy.spiller@duke-energy.com
rsugarman@keglerbrown.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
Gregory.dunn@icemiller.com
Christopher.miller@icemiller.com
Asim.haque@icemiller.com
rjhart@hahnlaw.com
rremington@hahnlaw.com
djmichalski@hahnlaw.com

stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jeanne.Kingery@duke-energy.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
vparisi@igsenergy.com
mswhite@igsenergy.com
Sandy.grace@exeloncorp.com
lmcalister@bricker.com
ricks@ohanet.org
tobrien@bricker.com
mhpetricoff@vorys.com
zkravitz@taftlaw.com
myurick@taftlaw.com
dane.stinson@baileycavalieri.com
Dorothy.Corbett@duke-energy.com
bpbarger@bcslawyers.com
dconway@porterwright.com
cmoore@porterwright.com
dstahl@eimerstahl.com
derekshaffer@quinnemanuel.com

AEs: Greta.see@puc.state.oh.us
Sarah.parrot@puc.state.oh.us

SERVICE LIST – 11-346-EL-SSO et al.

Werner.margard@puc.state.oh.us	jejadwin@aep.com
John.jones@puc.state.oh.us	mhpetricoff@vorys.com
lmcalister@bricker.com	smhoward@vorys.com
tsiwo@bricker.com	mjsettineri@vorys.com
MWarnock@bricker.com	wmassey@cov.com
stnourse@aep.com	henryeckhart@aol.com
mjsatterwhite@aep.com	jesse.rodriquez@exeloncorp.com
tobrien@bricker.com	sandy.grace@exeloncorp.com
fdarr@mwncmh.com	kpkreider@kmklaw.com
joliker@mwncmh.com	dmeyer@kmklaw.com
ghummel@mwncmh.com	BarthRoyer@aol.com
ricks@ohanet.org	Gary.A.Jeffries@dom.com
msmalz@ohiopovertylaw.org	gthomas@gtpowergroup.com
jmaskovyak@ohiopovertylaw.org	laurac@chappelleconsulting.net
Philip.sineneng@thompsonhine.com	Christopher.miller@icemiller.com
Dorothy.corbett@duke-energy.com	Gregory.dunn@icemiller.com
Elizabeth.watts@duke-energy.com	Asim.Haque@icemiller.com
myurick@taftlaw.com	sjsmith@szd.com
dconway@porterwright.com	tsantarelli@elpc.org
cmoore@porterwright.com	nolan@theoec.org
haydenm@firstenergycorp.com	trent@theoec.org
mkurtz@BKLawfirm.com	cathy@theoec.org
dboehm@BKLawfirm.com	ned.ford@fuse.net
emma.hand@snrdenton.com	gpoulos@enernoc.com
doug.bonner@snrdenton.com	sfisk@nrdc.org
dan.barnowski@snrdenton.com	zkavitz@taftlaw.com
JLang@Calfee.com	aehaedt@jonesday.com
lmcbride@calfee.com	dakutik@jonesday.com
talexander@calfee.com	callwein@wamenergylaw.com
ssolberg@eimerstahl.com	Terrance.Mebane@ThompsonHine.com
aaragona@eimerstahl.com	bbparger@bcslawyers.com
dstahl@eimerstahl.com	cendsley@ofbf.org
whitt@whitt-sturtevant.com	dane.stinson@baileycavalieri.com
mswhite@igsenergy.com	joseph.clark@directenergy.com
kaelber@buckleyking.com	sbruce@oada.com
walter@buckleyking.com	rsugarman@keglerbrown.com
judi.sobecki@dplinc.com	matt@matthewcoxlaw.com
randall.griffin@dplinc.com	mchristensen@columbuslaw.org
Stephanie.Chmiel@ThompsonHine.com	toddm@wamenergylaw.com
rjhart@hahnlaw.com	rburke@cpv.com
rremington@hahnlaw.com	bkelly@cpv.com
djmichalski@hahnlaw.com	eisenstatl@dicksteinshapiro.com
jhummer@uaoh.net	lehfeldtr@dicksteinshapiro.com
tlindsey@uaoh.net	kinderr@dicksteinshapiro.com
ssalamido@cloppertlaw.com	kwatson@cloppertlaw.com

arthur.beeman@snrdenton.com
yalami@aep.com

Thomas.millar@snrdenton.com
James.rubin@snrdenton.com

AEs: greta.see@puc.state.oh.us
Jonathan.tauber@puc.state.oh.us

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Summary: Memorandum Memorandum Contra Ohio Power Company's Motion for Consolidation by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.