

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and The Toledo)	
Edison Company for Authority to Provide)	Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to)	
R.C. 4928.143 in the Form of an Electric)	
Security Plan.)	

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM IN OPPOSITION TO
APPLICATIONS FOR REHEARING OF RETAIL ELECTRIC SUPPLY ASSOCIATION, THE
ENVIRONMENTAL LAW AND POLICY CENTER, AND OHIO MANUFACTURERS'
ASSOCIATION ENERGY GROUP**

Frank P. Darr (Reg. No. 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. No. 0088070)
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
mpritchard@mwncmh.com

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

The FirstEnergy electric distribution utilities, The Ohio Edison Company, The Toledo Edison Company, and Cleveland Electric Illuminating Company, (“FirstEnergy”) initiated this case seeking authorization of an electric security plan (“ESP”). FirstEnergy, several parties, and Staff of the Public Utilities Commission of Ohio (“Staff”) entered into several stipulations and recommendations (“Stipulations”) that were contested, and hearings were conducted. On March 31, 2016, the Public Utilities Commission of Ohio (“Commission”) issued an Opinion and Order in this case.

Several parties including Retail Electric Supply Association (“RESA”), the Environmental Law and Policy Center (“ELPC”), and Ohio Manufacturers’ Association Energy Group (“OMAEG”) sought rehearing of the Opinion and Order. RESA and OMAEG ask the Commission to grant rehearing of its authorization of the Non-Market-Based Pilot Program (“NMB Pilot Program”). OMAEG seeks rehearing of the

authorization of the expansion of the Economic Load Response Program (“ELR Program”). These requests are without merit and should be denied.

ELPC seeks a clarification of the Opinion and Order because the Commission did not address ELPC’s claim that customers participating in the ELR Program should not be permitted to exercise their statutory right to opt out of participation in the benefits and costs of FirstEnergy’s energy efficiency and peak demand reduction portfolio programs (“EE/PDR Portfolio Programs”). While the Commission did not address this issue in its Opinion and Order, the clarification that ELPC seeks is not correct because the requested clarification would unlawfully restrict the opportunity of eligible customers to opt out of the FirstEnergy EE/PDR Portfolio Programs.

II. THE COMMISSION CORRECTLY APPROVED PROVISIONS OF THE STIPULATIONS THAT IMPLEMENT THE NMB PILOT PROGRAM

The Stipulations contained a proposal for a transmission pilot program, the NMB Pilot Program. Under the proposal, a group of commercial and industrial customers¹ could explore whether they could benefit from opting out of FirstEnergy’s Non-Market-Based Services Rider (“Rider NMB”) and obtaining, directly or indirectly through a competitive retail electric service (“CRES”) provider, all transmission and ancillary services through the Open Access Transmission Tariff (“OATT”) and other governing documents of PJM Interconnection, LLC (“PJM”) that are approved by the Federal Energy Regulatory Commission (“FERC”), and are applicable to the zone in which the end user is located. The Stipulations specified the customers and accounts eligible to participate in the NMB Pilot Program and the process by which eligible customers may participate or discontinue participation. The Stipulations also stated that participating customers must

¹ Generally speaking, the eligible customers are more sophisticated and have more sophisticated metering. Tr. Vol. XXIX at 6082-83.

commit to obtain and pay for all transmission and ancillary services through the otherwise applicable OATT. Cos. Ex. 3 at 3-5 and Cos. Ex. 154 at 17.

In its post-hearing brief, RESA asserted that the NMB Pilot Program is unduly limiting because all interested parties do not have an opportunity to participate in the NMB Pilot Program and that the pilot was not properly designed. Initial Brief of the Retail Energy Supply Association at 49-51 (Feb. 16, 2016) (“RESA Initial Brief”). In its Opinion and Order, the Commission disagreed, holding, “[t]he nature of any pilot program is to keep the number of participants manageable in order to make some determination of the efficacy of the program being tested. ... RESA cites to no evidence in the record that any customers who wish to participate in, and would benefit from, the Rider NMB pilot program cannot do so because of the limits on the size of the pilot program.” Opinion and Order at 112.

In its application for rehearing, RESA again advances the same argument that the NMB Pilot Program is unduly discriminatory and not properly designed. RESA Application for Hearing at 97-99. In OMAEG’s application for rehearing, it joins RESA’s claim that the NMB Pilot Program is unduly discriminatory. OMAEG Application for Rehearing at 57-60.² The assignments of error are without merit and should be rejected.

A. RESA and OMAEG raise no new argument that justifies an order to rehear the authorization of the NMP Pilot Program

As noted above, RESA’s assignments of error concerning the NMB Pilot Program present the same issues it presented in its post-hearing brief. Because the Commission

² OMAEG also inquires as to the additional five customers that were added to the NMB pilot program. OMAEG Application for Rehearing at 57-58. This inquiry does not appear to be a ground for reversal, and OMAEG never explains why the Commission should address this inquiry. OMAEG also seeks to disparage the motivations of parties participating in the NMB Pilot Program while also maintaining that it should be expanded. *Id.* at 60-63. These contradictory positions suggest that OMAEG’s real complaint with the NMB Pilot Program has nothing to do with the merits of the program and should be rejected.

has already addressed the claims that the NMB Pilot Program is unduly discriminatory and not properly designed, and neither RESA nor OMAEG presents a new argument, the Commission should deny the assignments of error. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Second Entry on Rehearing at 25-26 (May 28, 2015) (“AEP-Ohio ESP III”).

B. The limit on participation in the NMB Pilot Program is not unduly discriminatory

As the Ohio Supreme Court and this Commission have long recognized, an electric utility may enter into pilot program rates that may not be uniformly available to all customers. In *Weiss v. Public Utilities Commission of Ohio*, 90 Ohio St.3d 15 (2000), for example, the Court approved a Commission order permitting The Cleveland Electric Illuminating Company to adjust rates to meet competition through competitive response contracts. Rejecting a customer’s complaint that the pilot rate program was unduly discriminatory under various provisions of R.C. Chapter 4905 because the customer did not have facilities in an area covered by the pilot rate program, the Court held that “a discriminatory classification is not prohibited if it is reasonable.” *Id.* at 16. The Court went on to find that it was reasonable to defer to the Commission’s classification of customers based on the existence of a competitive alternative for electric service. *Id.* at 17-18.

As in *Weiss*, the question is not whether there is a classification because the Commission may classify customers in such a way that some may participate and others are excluded. Rather, the question is whether the classification is reasonable.

In this case, it is reasonable to limit the availability of the NMB Pilot Program because the limitation properly reflects the experimental nature of the pilot. The NMB Pilot Program is presented for the purpose of determining if there is value in permitting

certain customers with the expertise and metering capability the opportunity to secure transmission service either directly from PJM or through a CRES provider. The parties that will participate are of sufficient size and sophistication and have the metering capability to determine if the NMB Pilot Program offers an opportunity for them to reduce their total energy bills. Tr. Vol. XXIX at 6082-83. Because the proposed limitation is reasonable, the classification of customers is not unduly discriminatory.

Moreover, RESA and OMAEG have not demonstrated any prejudice that justifies rejection of the NMB Pilot Program. As the Commission found, “RESA cites to no evidence in the record that any customers who wish to participate in, and who would benefit from, the Rider NMB pilot program cannot do so because of the limits on the size of the pilot program.” Opinion and Order at 112. Rather than meeting the issue the Commission presented when it rejected RESA’s claim, however, RESA argues that the program might be opened up to other customers. OMAEG also fails to meet the Commission’s challenge and instead argues that there are no guarantees that all customers that want to participate would be permitted to participate. RESA Application for Rehearing at 98; OMAEG Application for Rehearing at 59. Neither provides any evidence that the limitation is preventing a customer that wishes to participate from doing so.

Moreover, RESA’s members do not suffer any injury. They are electric suppliers, not end users, that can elect to offer electric services to NMB Pilot Program participants at the same rates contained in Rider NMB. Tr. Vol. XXVI at 5357-58. Alternatively, RESA’s members can also elect not to offer electric services to program participants. *Id.* In either case, RESA members cannot validly argue that they will be injured by the Commission’s authorization of the NMB Pilot Program.

Since neither RESA nor OMAEG has demonstrated that it is injured, the Commission can reject their assignments of error that the NMB Pilot Program is unduly limiting. *Weiss*, 90 Ohio St.3d at 18-19; see also *Holladay v. Pub. Util. Comm'n of Ohio*, 61 Ohio St.2d 335, 337 (1980) (“We need not consider the standards included in [R.C. 4905.33 and 4905.35] since appellant has not demonstrated that the classification has resulted in higher electric bills or that appellant has otherwise been prejudiced.”); *Ohio Edison Co. v. Pub. Util. Comm'n of Ohio*, 173 Ohio St. 478, 496 (1962) (no ground to appeal where the effect of the alleged error does not prejudice the appellant).

C. The design of the NMB Pilot Program allows customers to determine if securing transmission service directly or through a CRES provider is cost-effective

RESA also alleges that NMB Pilot Program is poorly designed and that the Opinion and Order presupposes that the program will benefit customers. RESA Application for Rehearing at 98-99. This argument finds no support in the Commission findings. See Opinion and Order at 112. Even if the Commission was presupposing that the NMB Pilot Program may provide customer benefits, that presupposition is justified because the record demonstrates that the program may produce a lower delivered cost of electricity if participating customers can manage effectively their system transmission peaks. Tr. Vol. XXXIV at 7021-22. If participating customers better manage their system transmission peaks, non-participating customers will benefit from increased reliability. Tr. Vol. XXVI at 5325-26. See, also, Initial Brief in Support of ESP IV Stipulation by Nucor Steel Marion, Inc. at 26-28 (Feb. 16, 2016) (“Nucor Initial Brief”). Accordingly, RESA’s assignment of error alleging that the NMB Pilot Program is poorly designed and presupposes that customers will benefit is without merit.

III. THE COMMISSION CORRECTLY CONCLUDED THAT THE EXPANSION OF THE ELR PROGRAM SHOULD FACILITATE OHIO'S EFFECTIVENESS IN THE GLOBAL ECONOMY

OMAEG assigns as error that the Commission failed to address OMAEG's concerns with the provisions of the Stipulations that expand the availability of the ELR Program. OMAEG Application for Rehearing at 61. The Commission should reject this assignment of error because the Commission addressed OMAEG's concerns and the expansion is reasonable.

Under FirstEnergy's current ESP, the ELR Program is available to only non-shopping customers that previously participated in FirstEnergy's interruptible tariff programs, but there is no limit on the amount of load that may be included in the ELR Program. Currently eligible customers receive a credit of \$10/kW per month through the ELR Rider and the EDR(b) Rider for Curtailable Load. The current program also includes a provision under which FirstEnergy may assess a participating customer an Economic Buy-Through Charge during an Economic Buy-Through Option Event that is assessed on the portion of the customer's load that exceeds its pre-established contract Firm Load for any and all hours during such events ("EBT Charge"). FirstEnergy offsets the credits provided to eligible customers through the DSE1 and EDR(e) Riders. See, e.g., Cleveland Electric Illuminating Company, Schedule of Rates for Electric Service, Sheets 101, 115, and 116.³

Under the recommendations contained in the Stipulations that the Commission approved in the Opinion and Order, the ELR Program would be continued and be

³ The tariffs are available and may be viewed at:

<http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Cleveland%20Electric%20Illuminating%20Company,%20FIRSTENERGY/PUCO%2013%20Schedule%20of%20Rates%20for%20Electric%20Service.pdf>.

available to existing ELR Program customers and customers that have historically been eligible for the ELR Program, but are not currently taking service under the current program. Eligible customers could take generation service from either FirstEnergy or a CRES provider, but load eligible to participate in the ELR Program would be capped at current enrollment levels and up to an additional 136,250 kW. The provisions of the current ELR Program for economic buy-through would be removed, but customers would be required to reduce load in response to emergencies called by FirstEnergy, American Transmission Systems Inc. (“ATSI”), or PJM. Participating customers would receive a credit of \$5/kW per month by unit of Curtailable Load under the ELR Rider, with the credit recovered through the DSE1 component of the Demand Side Management and Energy Efficiency Rider (“Rider DSE”). The EDR(b) Rider credit would be \$5/kW per month by unit of Curtailable Load as defined by ELR Rider, and the EDR(b) Rider credit would be recovered in the EDR(e) Rider, in the same manner as the credit is recovered in FirstEnergy’s current ESP. Cos. Ex. 2 at 7-9, Cos. Ex. 3 at 1-3, and Cos. Ex. 154 at 14.

In its initial brief, OMAEG argued that the ELR Program “may provide benefits to those few participating customers taking service under Rider ELR, [but] it is not widely available, not uniformly applied, and thus, not beneficial to all customers.” OMAEG Initial Brief at 93 (Feb. 16, 2016). In the Opinion and Order, the Commission noted OMAEG’s concerns, but rejected them and found that the expansion of the ELR Program was one of several provisions that “should facilitate the state’s effectiveness in the global economy in accordance with R.C. 4928.02(N).” Opinion and Order at 73 & 94.

OMAEG seeks rehearing of the Commission’s Opinion and Order approving the ELR Program because it is discriminatory and anti-competitive. In support of its assignment of error, OMAEG reiterates the arguments it presented in its initial post-

hearing brief that the program is too expensive, that the program should be more broadly available, and that the collection of the costs of the program should be spread more broadly. OMAEG Application for Rehearing at 61. OMAEG then complains that the Commission failed to address its arguments. *Id.*

As noted above, OMAEG's claim that the Commission did not address its issues is not correct. Additionally, OMAEG raises no new issue that the Commission has not addressed. Therefore, its assignment of error should be denied. *AEP-Ohio ESP III*, Second Entry on Rehearing at 25-26.

Further, the Commission correctly concluded that the expanded ELR Program facilitates Ohio's effectiveness in a global economy. The modified ELR Program will provide benefits to existing and potential customers, nonparticipating customers, and FirstEnergy. These benefits include increased system reliability and stability, the prevention of load shedding (*i.e.*, rolling blackouts) during emergency events, and job retention. See citations to transcript in the Post Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 108 and n. 521-23 (Feb. 16, 2016) ("Cos. Initial Brief"); Post-Hearing Brief of the Ohio Energy Group at 24-25 (Feb. 16, 2016) ("OEG Initial Brief"); and Nucor Initial Brief at 12-15. By providing eligible customers a means of reducing their electric generation expenses, continuation of a modified ELR Program would also further Ohio industrial companies' effectiveness in the global economy. Cos. Initial Brief at 148. As the record demonstrates, an interruptible rate program advances "numerous benefits, including the promotion of economic development and the retention of manufacturing jobs." *AEP-Ohio ESP III*, Opinion and Order at 40 (Feb. 25, 2015). If clarification is necessary, the record supports the Commission's finding that the ELR Program supports state policy.

Moreover, the program does not unduly discriminate against customers that do not participate in the program due to the limitations on the size of the program. As the Commission has previously recognized, there is a cost to these programs that is shared by other customers and some limitation on the size of the program is justified. See *AEP-Ohio ESP III*, Second Entry on Rehearing at 9 (May 28, 2015). In this instance, OMAEG cannot reasonably argue that the program is both too expensive and not sufficiently expansive; the competing arguments cannot be rationalized.

IV. THE COMMISSION SHOULD CLARIFY THAT CUSTOMERS PARTICIPATING IN THE ELR PROGRAM MAY OPT OUT OF THE EE/PDR PORTFOLIO PROGRAMS AS PROVIDED BY THE STIPULATION

The Stipulations contain a provision stating that “ELR customers may opt out of the opportunity and ability to obtain direct benefits from FirstEnergy’s EE/PDR Portfolio Plans as provided in S.B. 310.” Cos. Ex. 2 at 8. In its post-hearing brief, ELPC argued that this provision is unlawful because R.C. 4928.6613 prohibits a customer to take service under the ELR Program and at the same time to opt out of the costs and benefits of FirstEnergy’s EE/PDR Portfolio Programs under R.C. 4928.6611.⁴ ELPC Initial Brief at 59. The Commission noted ELPC’s argument in its discussion of the parties’ positions in the Opinion and Order at 106, but did not resolve the merits of ELPC’s argument, as ELPC notes in its assignment of error. ELPC Application for Rehearing at 24. While the Commission should clarify the Opinion and Order, it should reject ELPC’s argument that

⁴ Under R.C. 4928.6611, eligible customers served by electric distribution companies state-wide will be eligible to opt out under R.C. 4928.6611 beginning January 1, 2017. Under Section 7 of SB 310, however, eligible customers of FirstEnergy could opt out beginning January 1, 2015 because FirstEnergy elected to amend their portfolio plans. *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, *et al.*, Finding and Order (Nov. 20, 2014). The Stipulations recognize FirstEnergy’s eligible customers’ current right to elect to opt out under Section 7 of SB 310.

R.C. 4928.6613 prohibits customers participating in the ELR Program from opting out of the EE/PDR Programs.

Initially, it is incorrect to assume, as ELPC does, that the ELR Program is part of FirstEnergy's EE/PDR Portfolio Programs such that a customer taking service under the program cannot elect to opt out. The current ELR Program is a provision of FirstEnergy's tariffs that was approved as part of the current ESP, not as part of the portfolio plans. *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order *passim* (July 18, 2012). The next ELR Program set out in the Stipulation is an extension of the same program with some modifications and is a provision of the next ESP, not the EE/PDR Portfolio Programs.

Additionally, the benefits of the ELR Program extend beyond FirstEnergy's compliance with EE/PDR requirements. As noted above, the ELR Program enhances system reliability and stability, reduces the likelihood of load shedding, and assists in job retention.

Because the ELR Program is not approved as a part of FirstEnergy's EE/PDR Portfolio Plans and provides benefits that extend beyond compliance with EE/PDR requirements, a customer electing to take service under the ELR Program should not be deemed to be taking a benefit of the EE/PDR Portfolio Programs. Accordingly, the provision of the Stipulations making explicit that a customer taking service under the ELR Program may elect to opt out of the Portfolio Programs does not violate the limitation contained in R.C. 4928.6613.⁵

⁵ For the same reason, the provision of the Stipulation that ELPC finds objectionable would not violate Section 10 of SB 310. Section 10 provides that no account properly identified in a notice of intent to opt

Taking ELPC's argument concerning the availability of the opt out provided under SB 310 to its logical conclusion, moreover, would encourage customers to not offer their demand response capabilities to FirstEnergy. An opt out customer could use its demand response to reduce its capacity obligation without loss of the statutory opt out right. These customers could benefit from reducing their capacity charges and have no obligation to offer those capabilities to FirstEnergy. If the customer participates in the ELR Program, however, that customer would be subject to unlimited emergency interruptions by FirstEnergy, ATSI, and PJM. Tr. Vol. III at 494. The customer gives up its right to use emergency-related demand response as it may see fit, and FirstEnergy is then able to use this demand response capability to address emergency circumstances that might otherwise cause involuntary interruptions of service to other non-interruptible customers.

If the Commission accepted ELPC's argument, however, customers with demand response capabilities would be deterred from taking service under the ELR Program since they would not be permitted to opt out of the EE/PDR costs and benefits under SB 310. As a result, FirstEnergy and its other customers would not receive the full collective benefit of larger customers' demand response.

Establishing barriers to securing demand response resources should not be an outcome of the Commission's review of the Application and Stipulations. Accordingly, the Commission should reject ELPC's argument that the provision of the Stipulations recognizing that ELR Program customers have the right to opt out violates SB 310.

V. CONCLUSION

out by an eligible customer shall be subject to any cost recovery mechanism under R.C. 4928.66 or eligible to participate in or directly benefit from the amended portfolio plan.

For the reasons discussed above, the Commission should deny the assignments of error of RESA and OMAEG discussed above. Further, the Commission should clarify that customers taking service under the ELR Program may also opt out of participation in the EE/PDR Portfolio Programs of FirstEnergy.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. No. 0088070)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

fdarr@mwncmh.com

mpritchard@mwncmh.com

ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

CERTIFICATE OF SERVICE

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Memorandum in Opposition to Applications for Rehearing of Retail Electric Supply Association, PJM Power Providers Group and Electric Power Supply Association, the Environmental Law and Policy Center, and Ohio Manufacturers' Association Energy Group* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 12th day of May 2016, via electronic transmission.

/s/ Frank P. Darr

Frank P. Darr

James W. Burk
(Counsel of Record)
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY 76
South Main Street
Akron, Ohio 44308
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

James F. Lang
N. Trevor Alexander
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
tallexander@calfee.com

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
dakutik@jonesday.com

**COUNSEL FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY
THE TOLEDO EDISON COMPANY**

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

**COUNSEL FOR THE OHIO ENERGY
GROUP**

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

COUNSEL FOR OHIO POWER COMPANY

BRUCE J. WESTON OHIO CONSUMERS' COUNSEL

Larry S. Sauer
(Counsel of Record)
Maureen R. Willis
Kevin F. Moore
Ajay K. Kumar
William J. Michael
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street – Suite 1800
Columbus, Ohio 43215
Larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
William.Michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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

Adrian Thompson
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114
athompson@taftlaw.com

COUNSEL FOR CLEVELAND MUNICIPAL SCHOOL DISTRICT

Marilyn L. Widman
Widman & Franklin, LLC
405 Madison Ave., Suite 1550
Toledo, Ohio 43604
Marilyn@wflawfirm.com

COUNSEL FOR IBEW LOCAL 245

Richard C. Sahli (0007360)
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
rsahli@columbus.rr.com

Michael Soules
Earthjustice
1625 Massachusetts Ave. NW,
Suite #702
Washington, DC 20036
msoules@earthjustice.org

Shannon Fisk
(Counsel of Record)
Earthjustice
1617 John F. Kennedy Blvd.,
Suite #1675
Philadelphia, PA 19103
sfisk@earthjustice.org

Tony G. Mendoza
Kristin Henry
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105-3459
tony.mendoza@sierraclub.org
kristin.henry@sierraclub.org

COUNSEL FOR THE SIERRA CLUB

Jennifer L. Spinosi (0089162)
(Counsel of Record)
Direct Energy
21 East State Street, 19th Floor
Columbus, Ohio 43215
jennifer.spinosi@directenergy.com

Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Ave., N.W., 12th Fl.
Washington, D.C. 20006
ghull@eckertseamans.com

COUNSEL FOR DIRECT ENERGY SERVICES, LLC, DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY BUSINESS MARKETING, LLC

Colleen L. Mooney
(Counsel of Record)
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney@ohiopartners.org

COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY

Joseph E. Olikier
(Counsel of Record)
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com

COUNSEL FOR IGS ENERGY

Celia M. Kilgard
Devin D. Parram
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
ckilgard@taftlaw.com
dparram@taftlaw.com

COUNSEL FOR THE KROGER CO.

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

Matthew Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
mwarnock@bricker.com

COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION

Michael K. Lavanga
Garrett A. Stone
Stone Mattheis Xenopoulos & Brew, P.C.
1025 Thomas Jefferson Street, N.W.
8th Floor, West Tower
Washington, D.C. 20007-5201
mkl@smxblaw.com
gas@smxblaw.com

COUNSEL FOR NUCOR STEEL MARION, INC.

Barbara A. Langhenry
Harold A. Madorsky
Kate E. Ryan (Counsel of Record)
City of Cleveland
601 Lakeside Avenue – Room 106
Cleveland, Ohio 44114
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us

COUNSEL FOR THE CITY OF CLEVELAND

Kimberly W. Bojko
Danielle M. Ghiloni
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
ghiloni@carpenterlipps.com

COUNSEL FOR OMAEG

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, West Virginia 26003
lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, Pennsylvania 17050
dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
Roanoke, Virginia 24002-0090
charris@spilmanlaw.com

**COUNSEL FOR WAL-MART STORES
EAST, LP AND SAM'S EAST, INC.**

Joseph P. Meissner
Attorney at Law
1223 W. 6th Street – 4th Floor
Cleveland, Ohio 44113
meissnerjoseph@yahoo.com

**COUNSEL FOR CITIZENS COALITION,
CONSUMER PROTECTION
ASSOCIATION, CLEVELAND HOUSING
NETWORK, AND THE COUNCIL FOR
ECONOMIC OPPORTUNITIES IN
GREATER CLEVELAND**

Thomas R. Hays
8355 Island Lane
Maineville, Ohio 45039
trhayslaw@gmail.com

**COUNSEL FOR LUCAS COUNTY
BOARD OF COMMISSIONERS**

Leslie Kovacik
Counsel for the City of Toledo
420 Madison Avenue
Toledo, Ohio 43604
lesliekovacik@toledo.oh.gov

COUNSEL FOR THE CITY OF TOLEDO

Glenn S. Krassen
(Counsel of Record)
Bricker & Eckler LLP
1001 Lakeside Ave., Suite 1350
Cleveland, Ohio 44114
gkrassen@bricker.com

Dane Stinson
Dylan Borchers
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
dstinson@bricker.com
dborchers@bricker.com

**COUNSEL FOR NORTHEAST OHIO
PUBLIC ENERGY COUNCIL; OHIO
SCHOOLS COUNCIL; AND,
POWER4SCHOOLS**

M. Howard Petricoff (0008287)
(Counsel of Record)
Michael J. Settineri (0073369)
Gretchen L. Petrucci (0046608)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

COUNSEL FOR DYNEGY INC.

Matthew R. Cox
Matthew Cox Law, Ltd.
88 East Broad Street, Suite 1560
Columbus, Ohio 43215
matt@matthewcoxlaw.com

**COUNSEL FOR THE COUNCIL OF
SMALLER ENTERPRISES**

Madeline Fleisher
Staff Attorney
Environmental Law & Policy Center
21 W. Broad St., Suite 500
Columbus, OH 43215
mfleisher@elpc.org

**COUNSEL FOR THE ENVIRONMENTAL
LAW & POLICY CENTER**

Trent Dougherty
1145 Chesapeake Avenue, Suite I
Columbus, OH 43212
tdougherty@theOEC.org

John Finnigan
128 Winding Brook Lane
Terrace Park, Ohio 45174
jfinnigan@edf.org

**COUNSEL FOR THE OHIO
ENVIRONMENTAL COUNCIL AND
ENVIRONMENTAL DEFENSE FUND**

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

Laura Chappelle
201 North Washington Square - #910
Lansing, Michigan 48933
laurac@chappleconsulting.net

**ON BEHALF OF PJM POWER
PROVIDERS GROUP**

M. Howard Petricoff
Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com

Cynthia Brady
Exelon Business Services
4300 Winfield Rd.
Warrenville, Illinois 60555
Cynthia.brady@exeloncorp.com

David I. Fein
Exelon Corporation
10 South Dearborn Street – 47th Fl.
Chicago, Illinois 60603
David.fein@exeloncorp.com

Lael E. Campbell
Constellation NewEnergy, Inc. and Exelon
Corporation
101 Constitution Ave., NW
Washington, DC 20001
Lael.campbell@exeloncorp.com

**COUNSEL FOR EXELON GENERATION
COMPANY, LLC AND CONSTELLATION
NEWENERGY, INC.; PJM POWER
PROVIDERS GROUP; THE ELECTRIC
POWER SUPPLY ASSOCIATION; AND,
RETAIL ENERGY SUPPLY ASSOCIATION**

Christopher J. Allwein
Margeaux Kimbrough
Kegler Brown Hill and Ritter LPA
65 East State Street – 1800
Columbus, Ohio 43215
callwein@keglerbrown.com
mkimbrough@keglerbrown.com

**COUNSEL FOR HARDIN WIND LLC,
CHAMPAIGN WIND LLC AND BUCKEYE
WIND LLC**

Todd M. Williams
Shindler, Neff, Holmes, Worline & Muhler,
LLP
300 Madison Avenue
1200 Edison Plaza
Toledo, Ohio 43604
twilliams@snhslaw.com

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, Pennsylvania 19403
Jeffrey.mayes@monitoringanalytics.com

**COUNSEL FOR INDEPENDENT MARKET
MONITOR FOR PJM**

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th fl.
Washington, DC 20001
stheodore@epsa.org

**ON BEHALF OF THE ELECTRIC POWER
SUPPLY ASSOCIATION**

Margeaux Kimbrough
Kegler Brown Hill and Ritter LPA
65 East State Street – 1800
Columbus, Ohio 43215
mkimbrough@keglerbrown.com

**COUNSEL FOR HARDIN WIND LLC,
CHAMPAIGN WIND LLC AND BUCKEYE
WIND LLC**

Kevin R. Schmidt
Energy Professionals of Ohio
88 East Broad Street, Suite 1770
Columbus, Ohio 43215
Schmidt@sppgrp.com

**COUNSEL FOR THE ENERGY
PROFESSIONALS OF OHIO**

Christopher L. Miller
Gregory H. Dunn
Jeremy M. Grayem
Ice Miller LLP
250 West Street
Columbus, Ohio 43215
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com

**COUNSEL FOR THE ASSOCIATION OF
INDEPENDENT COLLEGES AND
UNIVERSITIES OF OHIO**

Craig I. Smith
Material Sciences Corporation
15700 Van Aken Blvd. – Suite 26
Shaker Heights, Ohio 44120
wtppmlc@aol.com

**COUNSEL FOR MATERIAL SCIENCES
CORPORATION**

Joel E. Sechler
Carpenter Lipps & Leland
280 N. High Street, Suite 1300
Columbus, Ohio 43215
sechler@carpenterlipps.com

Gregory J. Poulos
EnerNOC, Inc.
471 E. Broad Street – Suite 1520
Columbus, Ohio 43054
gpoulos@enernoc.com

COUNSEL FOR ENERNOC, INC.

David J. Folk
Assistant Director of Law
City of Akron
161 S. High Street - Suite 202
Akron, OH 44308
dfolk@Akronohio.Gov

COUNSEL FOR THE CITY OF AKRON

Daniel W. Wolff
Richard LehFeldt
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
dwolff@crowell.com
rlehfeldt@crowell.com

COUNSEL FOR CPV SHORE, LLC

Thomas McNamee
Thomas Lindgren
Attorney General's Office
Public Utilities Commission of Ohio
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215-3793
thomas.mcnamee@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov

**COUNSEL FOR THE STAFF OF THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Gregory Price
Mandy Willey Chiles
Attorney Examiner
Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215
Gregory.price@puc.state.oh.us
Mandy.chiles@puc.state.oh.us

ATTORNEY EXAMINERS

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