

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer. In the Matter of the Application of))))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs. In the Matter of the Application of))))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.))))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.))))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.))))	Case No. 12-672-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan))))	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs))))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13))))))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan))))))))	Case No. 08-1097-EL-UNC

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 PUBLIC UTILITIES COMMISSION OF OHIO

**MEMORANDUM IN OPPOSITION TO THE MOTIONS OF THE DAYTON POWER AND LIGHT COMPANY
TO WITHDRAW ITS ESP APPLICATION AND TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES**

Frank P. Darr (Reg. # 0025469)
(Counsel of Record)
Matthew R. Pritchard (Reg. # 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

On June 20, 2016, the Supreme Court of Ohio found that the Public Utilities Commission of Ohio (“Commission”) unlawfully authorized the Dayton Power and Light Company (“DP&L”) to bill and collect transition revenue or its equivalent under the guise of a “stability rider,” the Service Stability Rider (“SSR”). *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3490 (June 20, 2016). On June 21, 2016, Industrial Energy Users-Ohio (“IEU-Ohio”) and the Office of the Ohio Consumers’ Counsel (“OCC”) sought expedited orders terminating the billing and collection of the unlawful rider. DP&L initially resisted those efforts by claiming that the Clerk of the Court had not issued its mandate to the Commission. The Clerk of the Court then issued the mandate on July 6, 2016, thus removing the claimed procedural barrier. The Commission, however, has failed to issue an order terminating the billing and collection of the SSR.

In the meantime, DP&L filed three motions seeking orders that would authorize it to withdraw its current electric security plan (“ESP”) and to implement rates “consistent” with the rates in effect prior to the Commission’s decision implementing the current ESP.¹

¹ DP&L filed the motion to withdraw in the docket of its current ESP. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 12-426-EL-SSO, *et al.*, will be referred to as ESP II or the current ESP. DP&L filed two motions seeking to implement rates consistent with its prior ESP, one in the ESP II docket, and a second in the docket for its first ESP application. *In re the Matter of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 08-1094-EL-SSO, *et al.*, will be referred to as ESP I or the prior ESP.

In support of its motion seeking to withdraw the current ESP, DP&L claims that it has the option to withdraw its ESP because the Commission modified and approved its application for the current ESP and that the Supreme Court of Ohio “reversed in total” the Commission’s decision approving the ESP. ESP II, Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter, Memorandum in Support at 1 (“DP&L Motion to Withdraw”). In the other two motions, DP&L seeks orders to implement rates that are “consistent” with DP&L’s 2013 rates, asserting that the Commission should grant the motion under R.C. 4928.143(C)(2). ESP II, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 2; ESP I, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 2 (collectively, “DP&L Motions to Implement Rates”). Additionally, DP&L asserts that R.C. 4928.141 and 4905.32 require the Commission to permit DP&L to implement “consistent” rates because the Court reversed the order authorizing the current ESP “in total.” *Id.*

On August 1, 2016, DP&L filed a “Notice” setting out the rates that it seeks to implement. ESP I, The Dayton Power and Light Company’s Notice of Filing Proposed Tariffs (Aug. 1, 2016). Included in the Notice are tariff sheets that would retain standard service offer generation rates based on the outcomes of the auctions and the nonbypassable transmission rates approved as terms of the current ESP. *Id.* at 2. DP&L further seeks authority to bill and collect the nonbypassable Retail Stability Charge (“RSC”), a rider that remained in effect in September 2013 over the protests of IEU-Ohio and others based on the Commission order in the prior ESP case and which authorized DP&L to bill and collect \$76 million annually. *Id.*; see ESP I, Entry (Dec. 19, 2012).

The motions filed by DP&L do not set out grounds that permit it to withdraw its application, and the applicable statutory provision does not permit the Commission to order DP&L to implement the hodgepodge of tariff sheets for which it seeks authorization. While the Commission should deny the relief that DP&L is seeking through its Motions to Withdraw and Implement Rates, the Commission should proceed to order DP&L to terminate the billing and collection of the SSR as required by the Court's June 20, 2016 decision.²

II. DP&L'S MOTION TO WITHDRAW ITS ESP SEEKS RELIEF THAT IS NOT AUTHORIZED BY OHIO LAW

DP&L makes two claims on which it asks for a Commission order permitting it to withdraw its ESP application under R.C. 4928.143(C)(2)(a): (1) the Commission modified and approved DP&L's application for an ESP in 2013; and (2) the Supreme Court reversed "in total" the Commission's approval of the ESP. *Id.*, Memorandum in Support of Motion of The Dayton Power and Light Company to Withdraw its Applications in this Matter at 1. Neither claim supports the requested relief.

In relevant part, R.C. 4928.143(C)(2)(a) provides, "If the commission modifies and approves an application under division (C)(1) of [R.C. 4928.143], the electric distribution utility may withdraw its application, thereby terminating it." Thus, the circumstance

² This memorandum addresses procedural and substantive issues raised by the Motion to Withdraw and Motions to Implement Rates. IEU-Ohio is separately filing Comments demonstrating that DP&L's tariff filing is unreasonable and unlawful and should be rejected except as to the termination of the billing and collection of the SSR. As explained in those Comments, the Commission lacks the authority and record to authorize DP&L to implement the RSC and the nonbypassable transmission rider. IEU-Ohio's Comments, to be filed on August 12, 2016, are incorporated by reference. As set out in IEU-Ohio's Comments, the Commission should also begin a proceeding to determine the appropriate mechanism to adjust DP&L's rates to account for unlawful SSR billings.

permitting an electric distribution utility (“EDU”) to withdraw its ESP application requires a modification of the application by the Commission.

DP&L’s assertion that the 2013 Commission order modified DP&L’s application is not a ground permitting DP&L to withdraw its application. As the Commission recently made explicit, an EDU’s filing of tariffs implementing the terms and conditions of the order approving the ESP operates as acceptance of the ESP. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 99 (Mar. 31, 2016); *In the Matter of the Application of Ohio Power Company’s Proposal to enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.*, Opinion and Order at 106 (Mar. 31, 2016). Having filed tariffs, accepted the terms of the Opinion and Order approving its current ESP application, and benefited from the billing and collection of the SSR for two and half years, DP&L should not be permitted to withdraw because the Commission modified the application in the September 4, 2013 Opinion and Order.

Other than the Opinion and Order that DP&L accepted, DP&L does not point to any other Commission order modifying the ESP application. Compare *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 8 (2015) (Commission order modifying the previously approved carrying charge rate after the end of the term of the ESP modified the ESP application). Having failed to identify any other order modifying the ESP, DP&L’s motion does not assert a modification of the ESP that permits DP&L to withdraw its application.

DP&L's reliance on the Supreme Court's decision also does not provide a basis for granting the Motion to Withdraw. An EDU may withdraw an ESP only if "*the commission modifies and approves an application*" for an ESP. R.C. 4928.143(C)(2)(a) (emphasis added.) A Supreme Court decision reversing the SSR does not meet that condition.

Moreover, a Commission order implementing the Court's decision reversing the SSR will not trigger an opportunity for DP&L to withdraw its ESP application. As the Court has stated, "the clear purpose of R.C. 4928.143(C)(2)(a) ... [is] to allow a utility to withdraw its proposed ESP if it dislikes the commission's modifications." *In re Application of Ohio Power Co.*, 144 Ohio St.3d at 8. In this instance, however, the Commission would be acting under the direction of the Court when it orders the termination of the billing and collection of the SSR. Once the Clerk of the Court issued the mandate, the Commission was required to issue orders directing DP&L to bring its rates into compliance with the Court's order. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n of Ohio*, 46 Ohio St.2d 105, 116-17 (1976); *see, also, Nolan v. Nolan*, 11 Ohio St.3d 1 (1984) (syllabus) ("Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.") Because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, a Commission order terminating the SSR is ministerial only and should not serve as a basis for DP&L to withdraw its application.

In summary, under R.C. 4928.143(C)(2)(a), an EDU may withdraw its ESP application only if the Commission modifies and approves the application. DP&L has not

demonstrated that the Commission has taken such action. Accordingly, the Commission should deny DP&L's Motion to Withdraw.

III. DP&L'S MOTIONS TO IMPLEMENT RATES "CONSISTENT" WITH ITS 2013 ESP RATES SEEK RELIEF NOT AUTHORIZED BY OHIO LAW

DP&L also filed two substantively identical motions to implement rates "consistent" with the rates that were in effect before the Commission's order modifying and approving the ESP II Application on September 4, 2013. Motions to Implement Rates at 1. In support of the Motions, DP&L argues that R.C. 4928.143(C)(2)(b) directs the Commission to issue an order to permit DP&L to implement rates consistent with the rates in effect before the September 4, 2013 ESP II Order because DP&L has withdrawn its ESP application. In the alternative, DP&L claims that the Commission would be required to implement such rates under R.C. 4928.141 and R.C. 4905.32 because the Court has reversed the authorization of the current plan "in total." *Id.*, Memorandum in Support of Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates at 2. Neither of these claims has merit.

A. The Motions to Implement Rates are not authorized by R.C. 4928.143(C)(2)(b)

Before the Commission may issue an order to continue the provisions of the prior ESP, the utility must properly withdraw an application pursuant to R.C. 4928.143(C)(2)(a). R.C. 4928.143(C)(2)(b). As demonstrated above, R.C. 4928.143(C)(2)(a) does not provide DP&L the opportunity to withdraw its application for the current ESP because the Commission has not issued an order modifying the application for the current ESP and the Court's decision is not a lawful basis for withdrawal. Until the Commission enters an order modifying the ESP application (and an order terminating the billing and collection

of the SSR is not such an order), the Commission is without authority to issue the requested order to continue the provisions of the EDU's prior ESP.

Even if DP&L were authorized to withdraw, the Motions to Implement Rates request an order that would not comply with the requirements of R.C. 4928.143(C)(2)(b). That division provides that the Commission "shall issue such order as is necessary to continue *the provisions, terms, and conditions of the utility's most recent standard service offer*, along with any expected increases or decreases in fuel costs from those contained in that offer." (Emphasis added.) Rather than filing tariffs to continue the provisions, terms, and conditions of the prior ESP, however, DP&L requests authorization to implement the environmental investment rider and the \$76 million stability rider from the prior ESP while retaining its authorization of the nonbypassable transmission rider from the current ESP. ESP I, The Dayton Power and Light Company's Notice of Filing of Proposed Rates at 2. This request to "cherry pick" favorable rates, terms, and conditions of its prior and current ESPs is not authorized by R.C. 4928.143(C)(2)(b).

B. The Motions to Implement Rates are not authorized by R.C. 4928.141 and R.C. 4905.32

DP&L's alternative claim that R.C. 4928.141 and R.C. 4905.32 require the Commission to implement DP&L's preferred collection of tariff sheets because the Court reversed the ESP II Opinion and Order "in total" is incorrect both as to its reliance on R.C. 4928.141 and R.C. 4905.32 and its factual premise.

Initially, DP&L's reliance on R.C. 4928.141 and R.C. 4905.32 is misplaced because neither statute provides the Commission with the express authority to issue the order DP&L is seeking. The Commission is a creature of statute and may not exercise any authority "except that conferred and vested in it by statute." *Ohio Manufacturers'*

Assoc. v. Pub. Utils. Comm'n of Ohio, 46 Ohio St. 2d 214, 217 (1976). Under this well-understood rule, the Commission cannot authorize a public utility to levy a monetary penalty against its consumers, *id.*, authorize the billing and collection of transition revenue or its equivalent in violation of R.C. 4928.38, *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3490, or authorize terms and conditions of an ESP that are not authorized by R.C. 4928.143(B)(2), *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011). In its Motions to Implement Rates, however, DP&L baldly states that the Commission can authorize a combination of preferred tariff sheets under R.C. 4928.141 and 4905.32. As neither section provides any express authority for the Commission to authorize such an order,³ DP&L's alternative claim is without legal merit.⁴

Even if there were some authority under R.C. 4928.141 and 4905.32 to order rates different from those previously approved if the Court reversed the Commission's approval of the ESP "in total," DP&L's claim concerning the scope of the Court's decision is incorrect.

The Court cannot consider any matter that was not specifically set forth in an application for rehearing. R.C. 4903.10 ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper

³ R.C. 4928.141 provides that an EDU shall provide an SSO in accordance with R.C. 4928.142 or R.C. 4928.143 and that any such plan shall exclude any previously authorized allowances for transition costs. In relevant part, R.C. 4905.32 provides that "[n]o public utility shall charge, demand, exact, receive, or collect a different, rate rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time."

⁴ R.C. 4928.143(C)((2), in fact, sets out the circumstances under which the Commission may issue an order to continue the provisions of the prior ESP. As noted above, DP&L cannot demonstrate the conditions that would permit such an order.

application to the commission for a rehearing"); *Cincinnati v. Pub. Utils. Comm'n of Ohio*, 151 Ohio St. 353 (1949). Further, the Court will consider only those issues that are preserved in a notice of appeal. R.C. 4903.13; *Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 127 Ohio St.3d 524 (2010).

In the ESP II proceeding, IEU-Ohio and OCC properly sought rehearing and provided notice of appeal of a defined set of issues addressing the lawfulness of the SSR and its effect on the Commission's determination that the ESP was more favorable in the aggregate than a market-based alternative. (OCC also preserved two procedural errors. Those issues were not addressed by the Court's decision.) *In re Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Sup. Ct. Case No. 2014-1505, Notice of Appeal of Appellant Industrial Energy Users-Ohio (Aug. 29, 2014) and Second Notice of Appeal by the Office of the Ohio Consumers' Counsel (Sept. 22, 2014). Thus, the substantive issues before the Court set out in the notices of appeal of IEU-Ohio and OCC were limited to the authorization of the SSR and the Commission's application of R.C. 4928.143(C)(1).

Following an oral argument that focused on the Commission's authorization of the SSR, the Court held, "The decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___." *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3490 (June 20, 2016). The citation to *Columbus Southern* demonstrates that the Court was reversing the Commission's authorization of the SSR.

In *Columbus Southern*, the Court addressed several matters, but the common issue in that decision and the *DP&L* appeal is the lawfulness of the nonbypassable riders

designed to allow the EDUs to bill and collect transition revenue or its equivalent in violation of R.C. 4928.38. In the relevant portions of the Court's decision in *Columbus Southern*, the Court found that a nonbypassable rider that permitted Ohio Power Company ("AEP-Ohio") to bill and collect transition revenue or its equivalent was unlawful and ordered the Commission to determine how much of the revenue recovered from the nondeferral part of the RSR should be allocated to reduce the amount of deferred capacity costs. *In re Application of Columbus S. Power Co.*, Slip Op. 2016-Ohio-3490, at ¶¶ 12-40. In the *DP&L* appeal, as noted above, IEU-Ohio and OCC challenged the lawfulness of a rider that authorized DP&L to bill and collect transition revenue or its equivalent. Based on the IEU-Ohio and OCC appeals, the Court reversed on the authority of *Columbus Southern*. As the scope of the issues on appeal and Court's citation to *Columbus Southern* demonstrate, the Court's decision regarding DP&L's ESP was limited to a determination that the Commission unlawfully authorized the EDU to bill and collect transition revenue or its equivalent.

As "the law of the case," the Court's decision directs the Commission to take those actions that are consistent with the reversal of the SSR. Under the "law of the case" doctrine, "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). As a result of the Court's decision, therefore, the next required order in the ESP II case is a Commission order terminating the billing and collection of the SSR.⁵

⁵ DP&L's August 1, 2016 Notice of Filing of Proposed Rates also demonstrates that DP&L does not construe the Court's decision as a reversal "in total." From ESP I, it has submitted tariff sheets to implement rates for the bypassable environmental rider and the nonbypassable RSC. ESP I, The Dayton Power and Light Company's Notice of Filing of Proposed Rates at 2. At the same time, DP&L states that the tariff sheets

In summary, R.C. 4928.143(C)(2)(b), R.C. 4928.141 and R.C. 4905.32 do not authorize the Commission to order DP&L to implement the hodgepodge of tariff sheets it is requesting.

IV. THE COMMISSION IS SUBJECT TO AN ORDER DIRECTING IT TO TERMINATE DP&L'S BILLING AND COLLECTION OF TRANSITION REVENUE OR ITS EQUIVALENT

On June 21, 2016, IEU-Ohio and OCC moved for an order terminating the billing and collection of the SSR. Based on the Court's reversal of the authorization of the SSR, the Commission is now mandated to issue orders terminating the billing and collection of the rider for its remaining term. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n of Ohio*, 46 Ohio St.2d at 116-17. To date, however, the Commission has not issued the required order. There is no lawful basis for further delay. Accordingly, the Commission should issue an order directing DP&L to terminate the billing and collection of the SSR.⁶

V. CONCLUSION

The Court has found that the SSR was not lawfully authorized. To prevent DP&L from circumventing the Court's decision, the Commission should deny DP&L's Motion to

for transmission service "will not be changed." *Id.* If DP&L's claim that the order approving the ESP II application was reversed "in total" is pushed to its logical conclusion, DP&L's attempt to retain authority to bill transmission service through a nonbypassable rider authorized by ESP II would be misplaced; like the SSR, those rates would be without authorization and could not be continued as terms and conditions of any ESP.

⁶ Since IEU-Ohio and OCC filed their motion seeking the termination of the billing and collection of the SSR, the Commission has issued an entry approving adjustments to the allowable amounts collected from customers to account for the Commission's unlawful orders. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RSR, Entry at 7-8 (June 29, 2016). As discussed in IEU-Ohio's Comments concerning the notice of proposed tariffs, the Commission should initiate proceedings to determine the amount that was unlawfully collected under the SSR and provide a mechanism to adjust rates based on the Court's determination that the SSR permitted DP&L to bill and collect transition revenue or equivalent. This request is set out more fully in IEU-Ohio's Comments on the proposed tariffs and incorporated here by reference.

Withdraw and Motions to Implement Rates. To prevent the further unlawful billing and collection of transition revenue or its equivalent, the Commission should grant the motion of IEU-Ohio and OCC to terminate the unlawful billing and collection of the SSR.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. # 0025469)

(Counsel of Record)

Matthew R. Pritchard (Reg. # 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 *Memorandum in Opposition to the Motions of the Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 11th day of August, 2016, *via* electronic transmission.

/s/ Frank P. Darr

FRANK P. DARR

judi.sobecki@dplinc.com
randall.griffin@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com
arthur.meyer@dplinc.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
grady@occ.state.oh.us
etter@occ.state.oh.us
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
philip.sineneng@ThompsonHine.com
bmcMahon@emh-law.com
elizabeth.watts@duke-energy.com
rocco.d'ascenzo@duke-energy.com
ricks@ohanet.org
mwarnock@bricker.com
dborchers@bricker.com
gary.a.jeffries@dom.com
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
mswhite@igsenergy.com
barthroyer@aol.com
trent@theoec.org
williams.toddm@gmail.com
ejacobs@ablelaw.org
smhoward@vorys.com
david.fein@constellation.com
cynthia.a.fonner@constellation.com

Tasha.hamilton@constellation.com
Tony_Long@ham.honda.com
Stephen.bennett@exeloncorp.com
rbrundrett@ohiomfg.com
dconway@porterwright.com
aemerson@porterwright.com
haydenm@firstenergycorp.com
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
dakutik@jonesday.com
aehaedt@jonesday.com
jejadwin@aep.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
alan.starkoff@icemiller.com
chris.michael@icemiller.com
ssolberg@EimerStahl.com
philip.sineneng@ThompsonHine.com
mjsatterwhite@aep.com
stnourse@aep.com
bojko@carpenterlipps.com
Mohler@carpenterlipps.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
william.wright@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov
thomas.mcnamee@ohioattorneygeneral.gov
steven.beeler@ohioattorneygeneral.gov
devin.parram@puc.state.oh.us
gregory.price@puc.state.oh.us
mandy.willey@puc.state.oh.us

bryce.mckenney@puc.state.oh.us
henryeckhart@aol.com
Wis29@yahoo.com
bill.wells@wpafb.af.mil
chris.thompson.2@tyndall.af.mil
mchristensen@columbuslaw.org
stephen.chriss@wal-mart.com
mjsettineri@vorys.com
cynthia.brady@constellation.com
dstahl@eimerstahl.com
jennifer.spinosi@directenergy.com
O'Rourke@carpenterlipps.com