

BOEHM, KURTZ & LOWRY

**ATTORNEYS AT LAW
36 EAST SEVENTH STREET
SUITE 1510
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255
TELECOPIER (513) 421-2764**

VIA E-FILE

September 26, 2016

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

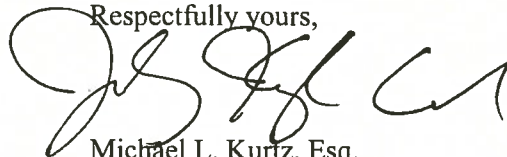
In Re: Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR

Dear Sir/Madam:

Please find attached the APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF THE OHIO ENERGY GROUP for filing in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'Michael L. Kurtz', is written over the typed name.

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew

Cc: Certificate of Service

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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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In the Matter of the Application of Dayton Power And Light Company For Approval of Its Electric Security Plan.	:	Case No. 12-426-EL-SSO
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In the Matter of the Application of Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 12-427-EL-ATA
	:	
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In the Matter of the Application of Dayton Power And Light Company For Approval of Certain Accounting Authority.	:	Case No. 12-428-EL-AAM
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company For Waiver of Certain Commission Rules.	:	Case No. 12-429-EL-WVR
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	:	
In the Matter of the Application of Dayton Power And Light Company to Establish Tariff Riders.	:	Case No. 12-672-EL-RDR

APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Energy Group (“OEG”) submits this Application for Rehearing of the Finding and Orders (“Orders”) issued by the Public Utilities Commission of Ohio (“Commission”) in the above-captioned dockets on August 26, 2016. OEG submits that the Orders are unlawful and unreasonable because:

- 1) The Commission erred by finding that the Supreme Court of Ohio ("Court") reversed the Commission's entire decision with respect to The Dayton Power and Light Company's ("DP&L" or "Company") 2016 Electric Security Plan ("ESP").
- 2) The Commission erred by allowing DP&L to withdraw its 2016 ESP in violation of R.C. 4928.143(C)(2)(a).
- 3) The Commission misapplied R.C. 4928.143(C)(2)(b) by selectively retaining elements of DP&L's 2016 ESP.
- 4) The Commission erred by failing to address OEG's request for a refund of the unlawful transition revenues collected by DP&L through the Service Stability Rider ("SSR") since that rider's inception.

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,



David F. Boehm, Esq.

Michael L. Kurtz, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: Dboehm@BKLawfirm.com

Mkurtz@BKLawfirm.com

Jkylercohn@BKLawfirm.com

September 26, 2016

COUNSEL FOR OHIO ENERGY GROUP

**BEFORE THE
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In the Matter of the Application of Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 12-427-EL-ATA
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In the Matter of the Application of Dayton Power And Light Company For Approval of Certain Accounting Authority.	:	Case No. 12-428-EL-AAM
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In the Matter of the Application of Dayton Power And Light Company For Waiver of Certain Commission Rules.	:	Case No. 12-429-EL-WVR
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In the Matter of the Application of Dayton Power And Light Company to Establish Tariff Riders.	:	Case No. 12-672-EL-RDR
	:	

MEMORANDUM IN SUPPORT

I. The Commission Erred By Finding That The Supreme Court Of Ohio Reversed The Commission’s Entire Decision With Respect To DP&L’s 2016 Electric Security Plan.

Contrary to the Commission’s interpretation, the Court did not reverse the entire Opinion and Order approving the DP&L’s 2016 ESP.¹ In addressing the limited legal challenges to DP&L’s 2016

¹ Finding and Order, Case Nos. 12-426-EL-SSO *et al* (“2012 Case Order”) at 4 (citing *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016)).

ESP, the Court was concise, stating: “[t]he decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co.*...2016- Ohio-1608...”² Hence, the scope of the Court’s decision with respect to DP&L’s 2016 ESP was limited by its findings in the *Columbus S. Power Co.* case (the “AEP Ohio ESP Appeal”).

The vast majority of the Court’s decision in the AEP Ohio ESP Appeal was dedicated to addressing Ohio Power Company’s (“AEP Ohio”) “*financial integrity*” charge – the Retail Stability Rider (“RSR”).³ The Court found that a “*financial integrity*” charge such as the RSR provided the utility with “*the equivalent of transition revenue*” in violation of R.C. 4928.38.⁴ The Court reversed and remanded the part of the Commission’s decision approving the RSR, ordering the Commission to determine the amount of unlawful “*transition revenue*” that AEP Ohio had collected from customers through the RSR and to refund that amount to customers on remand through an offset to its current RSR charge.⁵ The only other part of the AEP Ohio’s ESP reversed and remanded to the Commission concerned the utility’s significantly excessive earnings test threshold.⁶ Aside from those two components reversed by the Court, the remainder of the AEP Ohio’s ESP stayed intact.

Given the limited scope of the Court’s decision in the AEP Ohio ESP Appeal, the Court’s citation to that case as the sole basis for its decision on DP&L’s 2016 ESP can have only one meaning: that DP&L’s SSR, which is a “*financial integrity*” charge equivalent to AEP Ohio’s RSR, similarly provides DP&L with unlawful transition revenue and is therefore barred by R.C. 4928.38. But no aspect of the Court’s limited AEP Ohio ESP Appeal decision provides a rationale upon which to reverse all of the non-SSR components of DP&L’s 2016 ESP. For example, in DP&L’s 2016 ESP, the Commission approved a competitive bidding process and master supply agreement,⁷ changes to the Alternative

² Id. (emphasis added).

³ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608.

⁴ Id. at ¶25.

⁵ Id. at ¶40.

⁶ Id. at ¶66.

⁷ Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 16.

Energy rider true-up process,⁸ Reconciliation Riders,⁹ bifurcation of the Transmission Cost Recovery Rider,¹⁰ competitive retail enhancements,¹¹ and an Economic Development Fund.¹² Nowhere in the AEP Ohio ESP Appeal is there language that could reasonably be interpreted as reversing these components of DP&L's 2016 ESP. Consequently, the Commission's finding that the *entire* 2016 ESP Order was reversed on the basis of the AEP Ohio ESP Appeal is unfounded.

II. The Commission Erred By Allowing DP&L To Withdraw Its 2016 ESP In Violation of R.C. 4928.143(C)(2)(a).

The Commission misapplied R.C. 4928.143(C)(2)(a) when it allowed DP&L to withdraw the Electric Security Plan initially approved in Case Nos. 12-426-EL-SSO *et al* (the "2016 ESP") and to reinstate most of the ESP approved in Case Nos. 08-1094-EL-SSO *et. al* (the "2008 ESP") in its place.¹³ R.C. 4928.143(C)(2)(a) provides:

*If the **commission** modifies and approves **an application** under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.*¹⁴

The right of a utility to withdraw an ESP under R.C. 4928.143(C)(2)(a) is intended to address circumstances under which a *proposed* ESP application is modified by the *Commission*.

Here, the circumstances at issue were vastly different than those envisioned by the Legislature in enacting R.C. 4928.143(C)(2)(a). DP&L's 2016 ESP was not merely a proposal. Rather, that ESP was the result of a final, appealable Commission order, as the Company itself conceded.¹⁵ And the Commission did not *voluntarily* modify DP&L's 2016 ESP. Rather, the only modifications required –

⁸ Id. at 31.

⁹ Id. at 35.

¹⁰ Id. at 36.

¹¹ Id. at 38.

¹² Id. at 42.

¹³ 2012 Case Order at 4-6; Finding and Order, Case Nos. 08-1094-LE-SSO *et al* at ("2008 Case Order") at 7-11.

¹⁴ Emphasis added.

¹⁵ Fifth Entry on Rehearing, Case Nos. 12-426-EL-SSO *et al* (July 23, 2014); Notice of Cross-Appeal of the Dayton Power and Light Company (September 19, 2014) at 2 ("*Consequently, the Commission's ESP Orders are now final and appealable.*").

immediate cessation of the SSR during the 2016 ESP period and a refund of previously collected SSR charges - were entirely the result of the Court's mandate and therefore involuntary on the part of the Commission. Accordingly, given that DP&L's requests strayed far from the situation contemplated by the plain language R.C. 4928.143(C)(2)(a), that statute was not a basis upon which to approval withdrawal of its 2016 ESP.

A utility's statutory right to withdraw an ESP does not extend indefinitely. That right does not apply when the utility accepts a Commission-modified ESP by allowing that ESP to go into effect and then the Commission's final order is later modified by the Court. The law gives the utility a limited "veto" right over Commission modifications of a proposed application; it does not give the utility a "veto" right over decisions of the Court.

Once the 2016 ESP was subject to a final, appealable Commission order and DP&L allowed the ESP to go into effect, the Company could no longer invoke R.C. 4928.143(C)(2)(a) to withdraw that ESP. Allowing the Company to do so undermines the statutory appellate process provided for under R.C. 4903.13. The utility's statutory right to withdraw a proposed ESP must be read in concert with the other parties' statutory right to appeal a final Commission order and to receive the full relief ultimately provided by the Court. *"All statutes relating to the same general subject matter must be read in pari material, and in construing these statutes in pari material, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes."*¹⁶ The best way to harmonize those two statutes is to bar a utility from invoking R.C. 4928.143(C)(2)(a) after the date upon which the Commission issues a final appealable order on the utility's proposed ESP and the utility has accepted the Commission's modifications by allowing the ESP to go into effect.

In 2015, the Court stated that "[i]f the **commission** makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP

¹⁶ *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131).

application.”¹⁷ But the Court has never stated that a utility is entitled to thwart the Court’s appellate mandate by withdrawing its ESP after receiving an unfavorable decision from the Court.

Approving DP&L’s requests renders the appellate process ineffective and puts this Commission on a collision course with the Court. Reinstatement of most of DP&L’s 2008 ESP simply replaces one unlawful “*financial integrity*” charge (the SSR) with another (the Rate Stabilization Charge included in DP&L’s 2008 ESP). The cursory nature of the Court’s remand order seems to demonstrate a certain amount of frustration with the Commission’s recent handling of ESP matters. That frustration will only grow if the Court is effectively ignored in this instance. Approving DP&L’s attempted end-run around the Court’s recent decision substantially harms customers by forcing them to continue to pay unlawful transition revenues in direct contravention of the Court’s mandate, unjustly enriching DP&L’s corporate parent, Virginia-based AES.

III. The Commission Misapplied R.C. 4928.143(C)(2)(b) By Selectively Retaining Elements of DP&L’s 2016 ESP.

While the Commission invoked R.C. 4928.143(C)(2)(b) to reinstate most of DP&L’s 2008 ESP, the Commission did not restore every aspect of that ESP as directed by the statute. Instead, the Commission established a new hybrid ESP, which deviated, at a minimum, from DP&L’s 2008 ESP by: 1) allowing DP&L to recover competitive bid process energy and capacity costs through base generation rates and setting the fuel rider to zero, excluding amount being reconciled from prior periods; and 2) retaining the Company’s current transmission cost recovery riders.¹⁸ The Commission’s decision misapplied R.C. 4928.143(C)(2)(b). The latter statute provides:

If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, 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

¹⁷ *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056 at ¶26 (emphasis added).

¹⁸ 2008 Case Order at 8-10.

increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

Hence, the Commission is barred from selectively choosing which portions of a prior ESP will be reinstated and which will be overridden by components of a subsequent ESP. If an ESP is withdrawn pursuant to R.C. 4928.143(C)(2)(a), the Commission must simply reinstate the previous ESP with adjustments for expected fuel costs increases or decreases. The Commission seems aware of this statutory limitation on its authority, seeking to recharacterize competitive bidding process costs as “*fuel costs*” in order to fit that portion of its decision within the parameters of R.C. 4928.143(C)(2)(b).¹⁹ But the costs associated with the competitive bidding process are much more than “*fuel costs*” since they reflect all of the costs of energy and capacity needed to serve non-shopping customers. And the statute’s allowance of adjustments for “*fuel costs*” cannot be extended to grant the Commission authority for its decision to retain DP&L’s current transmission riders. Accordingly, the Commission exceeded its statutory authority when it crafted a new hybrid ESP to replace DP&L’s 2016 ESP.

IV. The Commission Erred By Failing To Address OEG’s Request For A Refund Of The Unlawful Transition Revenues Collected By DP&L Through The SSR Since That Rider’s Inception.

In its Memorandum Contra, OEG argued that the Court’s recent decisions require the Commission to order a refund of all SSR charges paid by customers to DP&L since September 4, 2013, when the SSR was initially approved by the Commission.²⁰ OEG further explained that the Court found no conflict between such a remedy and the retroactive ratemaking principles set forth in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957). Yet the Commission completely failed to address this argument. The Commission cannot simply ignore material arguments

¹⁹ Id. at 8.

²⁰ OEG Memorandum Contra at 5 (citing *See In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016) and Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 25).

raised by parties.²¹ The Commission should therefore grant rehearing to consider and approve OEG's requested refund.

Respectfully submitted,



David F. Boehm, Esq.

Michael L. Kurtz, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: Dboehm@BKLawfirm.com

Mkurtz@BKLawfirm.com

Jkylercohn@BKLawfirm.com

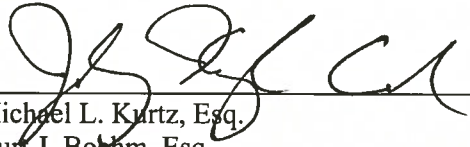
September 26, 2016

COUNSEL FOR OHIO ENERGY GROUP

²¹ *In re Comm Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607 at ¶51 (“AEP is correct that the commission failed to address its arguments in any substantive manner. Accordingly, we remand the cause to correct this error.”).

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 26th day of September, 2016 to the parties listed on the attached Certificate of Service.



Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.

CERTIFICATE OF SERVICE

Philip B. Sineneng, Esq.
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215
Philip.Sineneng@ThompsonHine.com

Amy B. Spiller, Esq.
Deputy General Counsel
Jeanne W. Kingery, Esq.
Associate General Counsel
DUKE ENERGY RETAIL SALES, LLC and
DUKE ENERGY COMMERCIAL ASSET
MANAGEMENT, INC.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Amy.Spiller@duke-energy.com
Jeanne.Kingery@duke-energy.com

Attorneys for Duke Energy Retail Sales, LLC and
Duke Energy Commercial Asset Management,
Inc.

Stephen Chriss, Esq.
Wal-Mart Corporation
702 Southwest 8th Street
Bentonville, AR 72716-021
Stephen.Chriss@wal-mart.com

Attorneys for Wal-Mart Stores East, LP
and Sam's East, Inc.

Mark A. Hayden, Esq.
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

James F. Lang, Esq.
Laura C. McBride, Esq.
CALFEE, HALTER & GRISWOLD LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com

N. Trevor Alexander, Esq.
CALFEE, HALTER & GRISWOLD LLP
1100 Fifth Third Center
21 E. State Street
Columbus, OH 43215-4243
talexander@calfee.com

David A. Kutik, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Attorney for FirstEnergy Solutions Corp.

Samuel C. Randazzo, Esq.
Frank P. Darr, Esq.
Matthew R. Pritchard, Esq.
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4225
sam@mwncmh.com
fdarr@mwncmh.com
mpritichard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

M. Anthony Long, Esq.
Senior Assistant Counsel
HONDA OF AMERICA MFG., INC.
24000 Honda Parkway
Marysville, OH 43040
tony_long@ham.honda.com

Attorney for Honda of America Mfg., Inc.

David F. Boehm, Esq.
Michael L. Kurtz, Esq.
BOEHM, KURTZ & LOWRY
36 East Seventh Street Suite 1510
Cincinnati, OH 45202-4454
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

Attorneys for Ohio Energy Group

Gregory J. Poulos, Esq.
EnerNOC, Inc.
471 East Broad Street
Columbus, OH 43215
Telephone: (614) 507-7377
gpoulos@enernoc.com

Attorney for EnerNOC, Inc.

Robert A. McMahon, Esq.
EBERLY MCMAHON LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
bmcmahon@emh-law.com

Rocco O. D'Ascenzo, Esq.
Associate General Counsel
Elizabeth Watts, Esq.
Associate General Counsel
DUKE ENERGY OHIO, INC.
139 East Fourth Street, 1303-Main
Cincinnati, OH 45202
Elizabeth.Watts@duke-energy.com
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

Jay E. Jadwin, Esq.
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
155 W. Nationwide Blvd., Suite 500
Columbus, OH 43215
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

Richard L. Sites, Esq.
General Counsel and Senior Director of
Health Policy
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Matthew W. Warnock, Esq.
Dylan F. Borchers, Esq.
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
mwarnock@bricker.com
dborchers@bricker.com

Attorneys for Ohio Hospital Association

Colleen L. Mooney, Esq.
OHIO PARTNERS FOR AFFORDABLE
ENERGY

231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
cmooney2@columbus.rr.com

Attorney for Ohio Partners for Affordable Energy

Ryan P. O'Rourke
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Email: o'rourke@carpenterlipps.com

Attorneys for The Kroger Company

Mark A. Whitt, Esq.
Andrew J. Campbell, Esq.
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, OH 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.
INTERSTATE GAS SUPPLY, INC.
6100 Emerald Parkway
Dublin, OH 43016
vparisi@igsenergy.com
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Trent A. Dougherty, Esq.
OHIO ENVIRONMENTAL COUNCIL
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
trent@theoec.org

Attorneys for the Ohio Environmental Council

Thomas W. McNamee, Esq.
Assistant Attorney General
180 East Broad Street
Columbus, OH 43215
Thomas.mcnamee@ohioattorneygeneral.gov

Attorneys for the Staff of the Public Utilities
Commission of Ohio

Maureen R. Willis, Esq.
Assistant Consumers' Counsel
Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Maureen.willis@occ.ohio.gov

Attorneys for Office of the Ohio Consumers'
Counsel

M. Howard Petricoff, Esq.
Stephen M. Howard, Esq.
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Attorneys for the Retail Energy Supply
Association, Exelon Generation Company,
LLC, Exelon Energy Company, Inc.,
Constellation Energy Commodities Group,
Inc., and Constellation NewEnergy, Inc.

Ellis Jacobs, Esq.
Advocates for Basic Legal Equality, Inc.
130 West Second Street, Suite 700 East
Dayton, OH 45402
ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood
Coalition

Jennifer L. Spinosi, Esq.
21 East State Street, Suite 1900
Columbus, OH 43215
jennifer.spinosi@directenergy.com

Christopher L. Miller, Esq.
Gregory J. Dunn, Esq.
Alan G. Starkoff, Esq.
ICE MILLER LLP
2540 West Street
Columbus, OH 43215
Christopher.Miller@icemiller.com
Gregory.Dunn@icemiller.com

Attorneys for City of Dayton, Ohio,
Direct Energy Services, LLC
and Direct Energy Business, LLC

Matthew J. Satterwhite, Esq.
Steven T. Nourse, Esq.
AMERICAN ELECTRIC POWER SERVICE
CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Attorneys for Ohio Power Company

Matthew R. Cox, Esq.
MATTHEW COX LAW, LTD.
4145 St. Theresa Blvd.
Avon, OH 44011
matt@matthewcoxlaw.com

Attorney for the Council of Smaller Enterprises

Stephen Bennett, Manager
State Government Affairs
300 Exelon Way
Kenneth Square, PA 19348
stephen.bennett@exeloncorp.com

Bill C. Wells, Esq.
AFMCLO/CL
Industrial Facilities Division
Bldg 266, Area A
Wright Patterson AFB, OH 45433
bill.wells@wpafb.af.mil

Christopher C. Thompson, Esq.
Staff Attorney (admitted *pro hac vice*)
USAF Utility Law Field Support Center
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

Attorneys for Federal Executive Agencies

Kimberly W. Bojko, Esq.
Joel E. Sechler, Esq.
Mallory M. Mohler, Esq.
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com
Mohler@carpenterlipps.com

Attorneys for SolarVision, LLC

Scott C. Solberg, Esq.
Eimer Stahl LLP
224 South Michigan Avenue, Suite 1100
Chicago, OH 60604
ssolberg@eimerstahl.com

Attorney for Exelon Generation Company,
LLC

Cynthia Fonner Brady, Esq.
Assistant General Counsel
EXELON BUSINESS SERVICES COMPANY
4300 Winfield Road
Warrenville, IL 60555
Cynthia.Brady@constellation.com

Attorney for Constellation
an Exelon Company

Lt Col John C. Degnan
Thomas A. Jernigan
Ebony M. Payton
Federal Executive Agencies (FAE)
139 Barnes Drive, Suite 1
Tyndall AFB FL 32403
John.Degnan@us.af.mil
Thomas.Jernigan.3@us.af.mil
Ebony.Payton.ctr@us.af.mil

Attorney for Federal Executive Agencies

Robert A. Brundrett, Esq.
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215
Email: rbrundrett@ohiomfg.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Mary W. Christensen, Esq.
Christensen Law Office LLC
8760 Orion Place, Suite 300
Columbus, OH 43240-2109
mchristensen@columbuslaw.org

Attorneys for People Working Cooperatively,
Inc.

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in

Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 12-0426-EL-SSO,

Summary: App for Rehearing Ohio Energy Group (OEGs) Application for Rehearing and Memorandum in Support electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group