

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Commission's)
Investigation of the Financial Impact)
of the Tax Cuts and Jobs Act of 2017)
on Regulated Ohio Utility Companies.) Case No. 18-0047-AU-COI

BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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
Facsimile: (614) 469-4653
fdarr@mwncmh.com
(willing to accept service *via* email)
mpritchard@mwncmh.com
(willing to accept service *via* email)

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COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

On January 1, 2018, the Tax Cuts and Jobs Act of 2017 ("TCJA") reduced the federal corporate income tax rate to 21%. Pub. L. 115-97, § 13001(a). In response to the enactment of the TCJA, the Public Utilities Commission of Ohio ("Commission") opened this investigation on January 10, 2018 "to consider the impacts of the [TCJA] and determine the appropriate course of action to pass benefits resulting from the legislation on to ratepayers." Entry, ¶ 1 (Jan. 10, 2018). It also ordered all rate regulated utilities to establish a deferred liability to record the estimated reduction in federal income tax. *Id.*, ¶ 7.

On February 9, 2018, the Electric Distribution Utilities ("EDU") sought rehearing of the Commission's order directing them and other rate-regulated utilities to establish a deferred liability. Joint Application for Rehearing of Ohio Power Company, Ohio Edison Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Feb. 9, 2018). In an Entry on Rehearing, the Commission found that it had authority under R.C. 4905.13 to order rate regulated utilities to establish a deferred liability and that it intended to assure that all tax impacts resulting from the TCJA will be returned to

customers. Second Entry on Rehearing ¶¶ 15 & 29-30 (Apr. 25, 2018). However, the Commission also directed an attorney examiner to set for hearing the narrow question whether the utilities should be required to establish a deferred tax liability, effective January 1, 2018. *Id.*, ¶ 31. The attorney examiners conducted the hearing on July 10, 2018. Transcript of Proceedings at 1 (July 13, 2018).

As demonstrated at the hearing, rate regulated companies are directed under generally accepted accounting principles (“GAAP”) and the accounting guidance of the Federal Energy Regulatory Commission (“FERC”) to record deferred tax liabilities or assets for the estimated future tax effects attributable to temporary differences based on provisions of enacted law. Further, GAAP and the FERC guidance direct a rate regulated utility to book or recognize a deferred liability if there is a probability that the amount of the tax savings is to be returned to customers. Based on the Commission’s directive that all tax benefits of the TCJA be returned to customers, these accounting principles also apply to tax savings of the utilities due to the tax rate reduction after January 1, 2018 and the return of amounts identified as excess accumulated deferred income taxes (“ADIT”). On the record in this case, therefore, the Commission’s order to all rate regulated utilities to establish a deferred liability to record the estimated reduction in federal income tax was and remains just and reasonable.

II. COMPLIANCE WITH ACCOUNTING REQUIREMENTS REQUIRES THE BOOKING OF A DEFERRED LIABILITY FOR AMOUNTS THAT WILL PROBABLY BE RETURNED TO CUSTOMERS

A. Base rates and some riders recover tax expense

The Commission’s order to establish a deferred liability to record the estimated reduction in federal income tax is premised on the recovery of tax expense in rates and riders.

In the determination of base rates under Revised Code Chapter 4909, the Commission is required to determine the cost of the utility in rendering utility service for a test period. R.C. 4909.15(A). In the Standard Filing Requirements used to define a rate application for rate regulated utilities, tax costs are included for ratemaking purposes in both an expense schedule and in the Gross Revenue Conversion Factor ("GRCF"). Rule 4901-7-1, Appendix A (Schedules C-4 and A-2, respectively).

Additionally, the Commission has engaged in single-issue ratemaking for both gas and electric utilities. Costs of providing utility service recovered through these riders may include the recovery of federal income tax. *See, e.g., In the Matter of the Distribution Rider for Ohio Power Company*, Case No. 14-1696-EL-RDR, Update Filing at 3 (May 18, 2018).

A complication in the ratemaking process arises due to timing differences for the recognition of income tax expense. A common example of the creation of a timing difference is the treatment of depreciation expense and its effect on tax expense. For federal income tax purposes, a public utility may have assets that are eligible to utilize accelerated depreciation. For ratemaking, however, the public utility uses straight-line depreciation. As a result, the tax return depreciation expense allowed for a new asset may initially be significantly higher than the ratemaking depreciation allowed. Over time, the relationship of the two will reverse, and the ratemaking depreciation expense for the asset will become greater than the tax return depreciation expense. To recognize the timing difference, the rate regulated utility is directed by GAAP and FERC guidance to book ADIT liabilities, which are later reversed as the ratemaking depreciation expense exceeds the tax return depreciation expense for the asset. *See discussion below.* The

ADIT is recognized as customer contribution to assets (essentially a source of cost-free capital), reducing rate base, and is amortized through an adjustment to tax expense.

B. The change in the federal income tax rate and the Commission's January 10, 2018 Entry require public utilities to adjust current deferred tax liabilities and assets and to book a deferred liability for tax savings probably to be returned to customers

The federal corporate tax reduction effective on January 1, 2018 resulted in a material change in the tax cost of rate regulated utilities. Staff Ex. 1 at 5-6 (changing the rate from 35% to 21% represents a reduction of 40%). Because the federal corporate income tax rate was reduced to 21%, the tax cost recovered in rates is overstated, and the ADIT liabilities and assets must be reduced to reflect the new tax rate. The reduction in the tax rate also results in "excess deferred income taxes" as the ADIT liabilities and assets that were established at a 35% tax rate are reduced to reflect the fact that the ADIT balances must be restated based on the 21% tax rate. IEU-Ohio Ex. 1 at 4.

Each of the material changes caused by the tax rate reduction has a potential effect on rates. The embedded tax cost and reduction in the GRCF would, directionally, reduce the revenue requirement, all else being equal. OCC Ex. 1 at 5. Further, to amortize the excess deferred income tax amount, the Commission may direct the public utility to identify the excess amount and then amortize it over some period.¹ Additionally, the Commission may adjust the public utility's rate base to account for the change in the deferred tax liability. OEG Ex. 1 at 8-9; see, *also*, IEU-Ohio Comments at 3 (Feb. 15, 2018).

¹ The proper amortization period will depend on whether the excess is deemed "protected" or "unprotected." OCC Ex. 1 at 7.

GAAP and the FERC guidance direct rate regulated utilities to address the tax change by recording changes in deferred liabilities and assets. Further, GAAP and the FERC guidance direct a rate regulated utility to book or recognize a deferred liability if there is a probability that the amount of the tax savings is to be returned to customers.

Under GAAP, rate regulated utilities are required to record deferred tax liabilities or assets for the estimated future tax effects attributable to temporary differences, and the measurement of current and deferred tax liabilities and assets is based on provisions of the enacted law. IEU-Ohio Ex. 1 at 5. GAAP also requires that deferred tax liabilities and assets be adjusted for the effect of an enacted change in tax laws or rates in the period of enactment. *Id.*, citing Accounting Standards Codification (“ASC”) 980-Regulated Operations, 740-Income Taxes (formerly FAS 109 – Accounting for Income Taxes). GAAP further provides that a rate regulated utility book or recognize a deferred liability if there is a probability that the amount of the tax savings is to be returned to customers. Tr. at 32-33.

FERC provides guidance like that found in GAAP. A public utility “shall adjust its deferred tax liabilities and assets for the effect of the change in tax law or rates in the period that the change is enacted. The adjustment shall be recorded in the proper deferred tax balance sheet accounts.” IEU-Ohio Ex. 1 at 5.² The guidance further provides: “If as a result of action by a regulator it is probable that the future increase or decrease in taxes payable due to the change in tax law or rates will be recovered from or returned to customers through future rates, an asset or liability shall be recognized in

² The accounting guidance, AI93-5, is available at <https://www.ferc.gov/enforcement/acct-matts/acct-guide.asp>.

Account 182.3, Other Regulatory Assets, or Account 254, Other Regulatory Liabilities, as appropriate, for the probable increase or reduction in future revenue.” *Id.*

Following accounting standards, Ohio Power Company (“Ohio Power”) and Duke Energy Ohio, Inc. (“Duke”) adjusted their accumulated deferred income tax liabilities for the effect of the tax rate change at the end of 2017. Ohio Power recorded a regulatory liability of \$665.7 million in FERC Account 254–Regulatory Liabilities. Duke recorded a net regulatory liability of \$446.9 million. *Id.* at 6. Both companies stated in federal filings that they did so to comply with GAAP because they expected that the amounts they identified would be returned to customers. *Id.* at 6-7.

C. The Commission’s order that rate regulated utilities record a deferred liability is just and reasonable

The changes implemented by Ohio Power, Duke, and other utilities to comply with GAAP at the end of 2017, however, do not address the tax savings beginning January 1, 2018. Although Ohio Power and Duke testified that they had complied with the Commission’s order to book a deferred liability for the period beginning January 1, 2018, Tr. at 14-15; Duke Ex. 1 at 4-5, both complain that they should not be required to do so. Their complaints, however, do not provide a reasoned or reasonable basis for reversing the Commission’s order directing them to establish a deferred liability to record the estimated reduction in federal income tax.

An accounting adjustment to recognize a deferred liability is justified in those instances when it is probable that the regulatory body will adjust rates to account for amounts that may be returned to customers. IEU-Ohio Ex. 1 at 5.³ The Commission’s

³ Although Ohio Power and Duke protest the Commission’s order, they agree with the premise that amounts that the rate regulated utilities may be required to return to customers should be booked as a deferred liability. Witnesses for both recognized that GAAP directed that treatment. Tr. at 32-33 and 70.

orders in this case demonstrate that it intends to adjust rates to return the reduction in tax cost, including any savings attributable to the period beginning January 1, 2018, to customers. See Second Entry on Rehearing ¶ 15 (“the Commission intends that all tax impacts resulting from the TCJA will be returned to customers, whether through this proceeding or through a case-by-case determination for each affected utility.”). Based on the premise that federal income tax impacts will be returned to customers, the deferral should be established and will permit tracking of amounts that may be returned to customers. IEU-Ohio Ex. 1 at 9-10; Tr. at 141.⁴

To avoid the effect of the accounting standards that would otherwise direct them to book the deferred liability, however, Ohio Power and Duke seek to redirect the Commission’s attention to spurious matters.

Ohio Power claims that it should not have to record the deferred liability unless it is earning more than its permitted return on investment. Ohio Power Ex. 1 at 4. The Commission, however, has already stated that Ohio Power will be directed to return to

⁴ The Commission’s order to book a deferred liability for the tax reduction in this case, moreover, is consistent with orders issued by several other states. See, e.g., *Tax Cuts and Jobs Act—Metropolitan Edison Co.*, 2018 Pa. PUC LEXIS 209 (June 14, 2018); *Kentucky Industrial Utility Customers v. Kentucky Utility Companies*, 2017 Ky. PUC LEXIS 1231 (Dec. 27, 2017); *Gulf Power Co.*, 343 P.U.R.4th 302 (Fl. Pub. Serv. Comm’n 2018); *In the Matter of the Commission’s Consideration on its Own Motion of the Effect of the Tax Cut and Jobs Act of 2017 on the Propriety of Rates Charged by Public Utilities and Telecommunications Companies Providing Service in Wyoming*, 2018 Wy. PUC LEXIS 23 (Jan. 23, 2018); *In the Matter of the Impact of the Federal Tax Cuts and Jobs Act of 2017 on Maryland Utility Rates*, 2018 Md. PSC LEXIS 11 (Jan. 12, 2018); *In the Matter of the Public Utilities Commission Instituting a Proceeding to Investigate the Impacts of the Tax Cuts and Jobs Act of 2017*, 2018 Haw. PUC LEXIS 59, Opinion (Jan. 26, 2018); *In the Matter of the Effect on Utilities of the 2017 Tax Cuts and Jobs Act*, 2018 W. Va. PUC LEXIS 120 (Jan. 26, 2018); *Proceeding to Investigate and Address the Effects of the Tax Cuts and Jobs Act of 2017 on the Rates of Texas Investor-owned Utility Companies*, 2018 Tex. PUC LEXIS 204 (Jan. 25, 2018); *Notice to Jurisdictional Utilities to Immediately Track and Record, as of January 1, 2018, the Impacts of the Tax Cuts and Jobs Act as a Regulatory Liability and Opening a Rulemaking Docket Regarding Same*, 2018 La. PUC LEXIS 25 (Feb. 21, 2018); *Investigation by the Department of Public Utilities, on its Own Motion into the Effect of the Reduction in Federal Income Tax Rates on the Rates Charged by Electric, Gas, and Water Companies*, 2018 Mass. PUC LEXIS 25 (Feb. 2, 2018).

customers the benefits of the tax reduction. How and when the benefits will be returned to customers will be addressed either later in this case or a separate matter. See, e.g., *In the Matter of the Ohio Power Company's Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1007-EL-UNC, Motion for a Procedural Schedule and Request for Expedited Ruling (June 8, 2018). The point of the order to book a deferral of the estimated savings is “to permit tracking of amounts so that the Commission can have the needed information for addressing each company’s situation for its TCJA related rate adjustments and the amounts to be returned to customers.” IEU-Ohio Ex. 1 at 10. In the meantime, the recognition of the deferral has no effect on rates. Tr. at 93, 112, and 134. Accordingly, the Commission should reject Ohio Power’s attempt to insert questions about earnings into a decision regarding the tracking of the tax savings as they are not relevant.

Taking a different route, Duke claims that the Commission should “allow due process to occur”⁵ before ordering it to book a deferred liability and asserts that the Commission should apply a five factor test that the Commission has used to address the merits of utility requests for authority to book deferred assets. Duke Ex. 1 at 8-9 & 14. Although Duke does not draw a conclusion on whether it should be ordered to establish a deferred liability, it loosely applies the five factors⁶ and states that the Commission

⁵ This invocation of due process ignores Duke’s right to rehearing and a review by both the Commission and the Supreme Court of Ohio. R.C. 4903.10 to R.C. 4903.13.

⁶ To avoid the conclusion that the order directing the utility to track the tax savings is reasonable, Duke’s witness both modifies the criteria and makes claims that are unsupported. For example, he modifies the factor concerning the utility’s control over the tax change to focus on the Commission’s control of an order to defer. Duke Energy Ohio Ex. 1 at 11. Similarly, he states that the first tax rate reduction since 1986 may not be atypical since “it is entirely possible that the next election could bring some additional changes in the FIT rates.” *Id.* The witness apparently appreciates that this claim will be unproductive and concedes that it is “fair” to conclude that the tax rate reduction is atypical. *Id.* Duke’s attempt to characterize the tax change as typical is also undermined by its application to reduce rates, which was filed after the hearing in this matter. In that application, Duke alleged that the TCJA is “the most significant revision to the Federal Tax Code within the last thirty years.” *In the Matter of the Application of Duke Energy Ohio, Inc., for*

should consider whether the amounts to be deferred are material or affected the financial integrity of Duke and suggests that the Commission's order (rather than the tax change) was within the Commission's control. Additionally, it states that the tax reduction could be considered typical. *Id.* at 9-12.

Duke's argument, however, is not consistent with the accounting standards it acknowledges or the multipart test it says applies.⁷ Since Duke maintains its books in compliance with GAAP and those standards require Duke to track a deferred liability for amounts that will probably be returned to customers, the Commission's decision to order Duke to track the tax savings directs what Duke already should be doing. Even if the Commission goes down Duke's suggested path and applies the multifactor test, however, the Commission's order directing the utilities to book a deferred liability "meets the criteria of the test" when properly applied. Staff Ex. 1 at 5-7 and note 6 above. At this point, Duke has had its opportunity to "allow due process to occur" and failed to demonstrate that the Commission's order is unlawful or unreasonable.

III. CONCLUSION

The Commission stated that the benefits of the federal income tax reduction will be returned to customers. Based on the Commission's statement, GAAP and FERC accounting directives require the recognition of a deferred liability. Because the Commission's order is consistent with these accounting directives and neither Ohio Power nor Duke offers a reasonable or reasoned basis to depart from these directives,

Implementation of the Tax Cuts and Jobs Act of 2017, Case Nos. 18-1185-EL-UNC, *et al.*, Application at 2 (July 25, 2018).

⁷ The Commission in this instance need not apply the multipart test since accounting requirements support the booking of the deferred liability.

the Commission should find that its order directing rate regulated utilities to book a deferred liability for the tax savings is just and reasonable.

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

fdarr@mwncmh.com

mpritchard@mwncmh.com

COUNSEL 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 the *Brief of Industrial Energy Users-Ohio* upon the following parties identified below to be served by the e-file system. In addition, I hereby certify that a service copy was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following identified parties of record this 13th day of August 2018, *via* email.

/s/ Frank P. Darr

Frank P. Darr

PARTIES LISTED ON E-FILE SYSTEM:

Rebekah Glover
Brian Dressel
Cheryl McDonald
Thomas Hays
Colleen Mooney
Teresa Orahood
Christen Blend
Scott Elisar
Frank Darr
Miranda Leppla
Jamie Williams
Kimberly Bojko
Mary Fischer
Joseph Olikar
Dane Stinson
Michael Kurtz
Steven Nourse
Tyler Teuscher
Carys Cochern
Carrie Dunn Lucco
Christopher Healey

PARTIES SERVED BY E-MAIL:

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Christopher Healey (0086027)
(Counsel of Record)
Zachary E. Woltz (0096669)
Bryce McKenney (0088203)
Amy Botschner-O'Brien (0074423)
65 E. State Street, Suite 700
Columbus, OH 43215
christopher.healey@occ.ohio.gov
zachary.woltz@occ.ohio.gov
bryce.mckenney@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov

OFFICE OF THE OHIO CONSUMERS' COUNSEL

Steven T. Nourse (0046705)
(Counsel of Record)
Christen M. Blend (0086881)
AMERICAN ELECTRIC POWER SERVICE
CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
cblend@aep.com

COUNSEL FOR OHIO POWER COMPANY

Rocco O. D'Ascenzo (0077651)
(Counsel of Record)
Jeanne W. Kingery (0012172)
DUKE ENERGY BUSINESS SERVICES LLC
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
rocco.dascenzo@duke-energy.com
jeanne.kingery@duke-energy.com

COUNSEL FOR DUKE ENERGY OHIO, INC.

Carrie M. Dunn-Lucco (0076952)
(Counsel of Record)
FIRSTENERGY SERVICE COMPANY
76 S. Main Street
Akron, OH 44308
cdunn@firstenergycorp.com

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

Michael J. Schuler (0082390)
(Counsel of Record)
THE DAYTON POWER AND LIGHT COMPANY
1065 Woodman Drive
Dayton, OH 45432
michael.schuler@aes.com

**COUNSEL FOR THE DAYTON POWER AND
LIGHT COMPANY**

Michael S.J. Lozich
SECURUS TECHNOLOGIES, INC.
4000 International Parkway
Carrollton, TX 75007
Mlozich@securustechologies.com

COUNSEL FOR SECURUS TECHNOLOGIES, INC.

Marty K. Whelan
5640 Lancaster-Newark Road, NE
Pleasantville, Ohio 43148
mwhelan@egas.net

**ON BEHALF OF NORTHEAST OHIO NATURAL GAS
CORPORATION, ORWELL NATURAL GAS COMPANY,
BRAINARD GAS CORPORATION, AND SPELMAN
PIPELINE HOLDINGS, INC.**

Stephen B. Seiple (0003809)
Joseph M. Clark (0080711)
COLUMBIA GAS OF OHIO, INC.
290 W. Nationwide Blvd.
P.O. Box 117
Columbus, OH 43216-0017
sseiple@nisource.com
josephclark@nisource.com

COUNSEL FOR COLUMBIA GAS OF OHIO, INC.

John Finnigan
6735 Hidden Hills Drive
Cincinnati, Ohio 45230
jfinnigan@edf.org

COUNSEL FOR ENVIRONMENTAL DEFENSE FUND

Madeline Fleisher
21 W. Broad Street, 8th Floor
Columbus, OH 43215
mfleisher@elpc.org

**COUNSEL FOR ENVIRONMENTAL
LAW & POLICY CENTER**

Daniel Sawmiller
2432 Edgevale Road
Columbus, OH 43221
dsawmiller@nrhc.org

**OHIO ENERGY POLICY DIRECTOR FOR NATURAL
RESOURCES DEFENSE COUNCIL**

Neil Waggoner
131 N. High Street, Suite 605
Columbus, OH 43215
neil.waggoner@sierraclub.org

**OHIO BEYOND COAL CAMPAIGN REPRESENTATIVE,
SIERRA CLUB**

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

COUNSEL FOR THE OHIO ENERGY GROUP

Thomas R. Hays (0054062)
COUNSEL FOR LUCAS COUNTY AND NOAC
8355 Island Lane
Maineville, OH 45039
trhayslaw@gmail.com

Leslie Kovacik (0070157)
COUNSEL FOR THE CITY OF TOLEDO AND NOAC
420 Madison Avenue, Fourth Floor
Toledo, OH 43604
leslie.kovacik@toledo.oh.gov

**COUNSEL FOR THE NORTHWEST OHIO AGGREGATION
COALITION, THE LUCAS COUNTY BOARD OF
COMMISSIONS, LAKE TOWNSHIP, PERRYSBURG
TOWNSHIP, THE CITY OF TOLEDO, THE CITY OF
PERRYSBURG, THE CITY OF MAUMEE, THE CITY OF
OREGON, THE CITY OF NORTHWOOD, THE CITY OF
WALTERVILLE, THE CITY OF SYLVANIA, THE CITY OF
ROSSFORD, THE VILLAGE OF DELTA, THE VILLAGE OF
OTTAWA HILLS, THE VILLAGE OF HOLLAND AND THE
VILLAGE OF WALBRIDGE**

Kimberly W. Bojko (0069402)
Brian W. Dressel (0097163)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
bojko@carpenterlipps.com
dressel@carpenterlipps.com

**COUNSEL FOR OHIO MANUFACTURERS' ASSOCIATION
ENERGY GROUP**

Angela Paul Whitfield (0068774)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
paul@carpenterlipps.com

COUNSEL FOR THE KROGER Co.

Gretchen L. Petrucci (0046608)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel. (614) 464-5407
glpetrucci@vorys.com

**ATTORNEYS FOR THE OHIO CABLE
TELECOMMUNICATIONS ASSOCIATION**

William Wright
ATTORNEY GENERAL'S OFFICE
30 East Broad St., 16th Fl.
Columbus, OH 43215
william.wright@ohioattorneygeneral.gov

Megan Addison
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 12th Floor
Columbus, OH 43215
megan.addison@puco.ohio.gov

ATTORNEY EXAMINER

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on behalf of Industrial Energy Users-Ohio