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FILE

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 Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	)))))))	Case No. 08-935-EL-SSO PUCO

BRIEF REGARDING A
SHORT-TERM ELECTRIC SECURITY PLAN
BY
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES

October 31, 2008

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I. INTRODUCTION AND STATEMENT OF THE ISSUE

A. Introduction

On July 31, 2008, Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company, (collectively, "FirstEnergy" or the "Companies") filed in this case their first-ever application ("Application") for approval of an electric security plan ("ESP"). If granted by the Public Utilities Commission of Ohio ("PUCO" or "Commission"), the Application will result in a significant increase in the rates paid by FirstEnergy's customers.

This brief by the undersigned members of the Ohio Consumer and Environmental Advocates ("OCEA") responds to the PUCO's request for arguments on the matter of whether a short-term ESP should be instituted while a longer-term standard service offer ("SSO") proposal is considered by the PUCO. The Companies included a "Severable Short Term ESP SSO Pricing" proposal ("Short-Term ESP Proposal") in paragraph 8 of its Application.[1] According to the Short-Term ESP Proposal, the Commission must act by November 14, 2008.[2] The Application states that its Short-Term ESP Proposal would apply until March 5, 2009, at which time the SSO would be offered either on ESP terms acceptable to FirstEnergy or according to the Companies' market rate offer ("MRO" proposed in Case No. 08-936-EL-SSO) proposal as modified by surviving terms from the Short-Term ESP Proposal.[3] FirstEnergy's terms include an *increase* in the generation rate consumers would pay over FirstEnergy's three-year ESP proposal, from an overall rate of 7.5 cents per kilowatt-hour[4] for the three-year plan to 7.75 cents per kilowatt-hour for the Short-Term ESP Proposal.[5]

Adoption of the Companies' Short-Term ESP Proposal would include approval of many parts of the Companies' longer-term ESP proposal. Such action would defeat the purpose of permitting additional time to work on an acceptable longer-term SSO.

B. The Companies' Short-Term ESP Proposal

FirstEnergy's Short-term ESP Proposal provides for the survival (i.e. approval) of many of the provisions in its longer-term ESP proposal, including some of the provisions of the longer-term proposal that are most troubling for consumers. The Companies propose to resolve issues in the distribution rate case (i.e. Cases 07-551-EL-ATA, et al., the "*Distribution Rate Case*") -- including the rate of return on equity, rate design, and

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[1] Application at 35.

[2] Id. at 35, ¶8.a.

[3] Id. at 36, ¶8.c.

[4] Id. at 5.

[5] Id. at 37.

tariff provisions -- according to the terms of the proposed longer-term ESP proposal.[6] These provisions conflict, however, with the Commission's severance of distribution rate case issues from the above-captioned case.[7]

FirstEnergy also proposes that provisions in the Short-Term ESP Proposal regarding distribution service would survive the expiration of that proposal that, while not at issue in the *Distribution Rate Case*, would increase distribution rates by means not previously approved by the Commission. The Delivery Service Improvement ("DSI") rider, additional distribution deferrals, and distribution riders would increase distribution rates that customers would pay and provide additional benefits to FirstEnergy.[8] These provisions are only distinguishable from the Companies aim to resolve the *Distribution Rate Case* on terms favorable to FirstEnergy by the fact that these distribution service terms are not at issue in that case.

FirstEnergy proposes the survival of provisions related to the determination of transmission rates.[9] The Companies propose the approval of their methodology regarding how significantly excess returns on common equity would be determined as part of its Short-Term ESP Proposal.[10] In the event of alterations to the Companies' terms or a successful appeal to the Supreme Court of Ohio, the Short-Term ESP Proposal would,

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[6] Id. at 37, approval of ¶A.3.b and A.3.d.

[7] Tr. Vol. I (October 16, 2008) (Attorney Examiner Price).

[8] Id., approval of ¶A.3.e. through A.3.k.

[9] Id., approval of ¶A.5.a and A.5.b.

[10] Id., approval of ¶A.7.d.

according to the Companies, require adjustment such that the Companies' profitability would be maintained.[11]

Finally, the Companies' Short-Term ESP Proposal provides that the bidding procedure contained in the proposed MRO be accepted as the means of setting SSO rates upon termination of the electric security plan determination of SSO rates.[12] The Commission, however, has not approved FirstEnergy's MRO proposal as sought by the Companies within ninety days of the date when the MRO proposal was submitted to the Commission.[13]

The foregoing shows that adoption of the Companies' Short-Term ESP Proposal would be harmful to customers and is impossible to implement at this juncture. The Commission's decision to resolve the *Distribution Rate Case* apart from the instant case conflicts with the terms of the Short-Term ESP Proposal. Approval of the Companies' other terms would require the adoption of proposals in FirstEnergy's longer-term ESP, and would defeat the purpose of permitting additional time to develop an acceptable SSO plan.

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[11] Id., approval of ¶A.7.h.

[12] Id., approval of ¶A.7.i.

[13] R.C. 4928.142(B). The application of the "90-day statutory timeframe expressly provided for in Section 4928.142(B), Revised Code" has been addressed in this proceeding. Entry at 4, ¶(8) (September 12, 2008).

II. ARGUMENT

A. The PUCO Should Protect Customers by Rejecting FirstEnergy's Terms for a Short-Term ESP.

A short-term ESP may have advantages, but the Companies' proposal would be counter-productive as a means towards providing reasonably priced electric generation service for FirstEnergy's customers.[14] As stated above, FirstEnergy's proposal requires acceptance of too many components from the Companies' longer-term ESP that are contentious as part of the hearings before the PUCO.

The Commission has already rejected at least one of the fundamental planks in the Companies proposed Short-Term ESP Proposal. The rates customers pay for distribution service will be determined in the *Distribution Rate Case* and not according to the Companies' filing in the above-captioned case.[15] Also, the Companies' MRO proposal has not won approval after the ninety-day period provided for such approval.[16] For all practical purposes, FirstEnergy's Short-Term ESP Proposal has already been rejected by the Commission.

The other planks of the Short-Term ESP Proposal are also unreasonable. The DSI rider, additional distribution deferrals, and distribution riders would increase distribution

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[14] R.C. 4928.02(A).

[15] Tr. Vol. I (October 16, 2008) (Attorney Examiner Price). Staff Witness Fortney proposed a course for a short-term ESP (Testimony at 10) that would require that the rate design proposed by FirstEnergy in the *Distribution Rate Case*, supported by Staff, not be adopted and placed into effect on January 1, 2009. Mr. Fortney was concerned about the "mismatch" of rate designs in the *Distribution Rate Case* and the ESP proceeding. Tr. Vol. VIII (October 27, 2008) (Fortney). He concluded, however, that the recommendation contained in his October 6, 2008 testimony was no longer possible. Id. The alteration of billing systems required by implementation of electric restructuring legislation enacted in 1999 (i.e. "S.B. 3") should accommodate different rate designs for distribution (non-competitive service) and generation service (a separate competitive service).

[16] R.C. 4928.142(B).

rates[17] in a manner that is inconsistent with protections for customers in normal distribution ratemaking. These provisions also increase distribution rates for existing distribution service that were not under consideration in the *Distribution Rate Case* and cannot result from the record in that case. Money is fungible. FirstEnergy's categorization of some money as resulting from the resolution of the *Distribution Rate Case* and other money, such as that resulting from the DSI rider, as resulting from additional needs to provide distribution service[18] does not change the practical result sought by FirstEnergy -- increased distribution rates. Staff Witness Fortney's recommendation -- that distribution rates should be adjusted in comprehensive distribution rate proceedings conducted according to R.C. Chapter 4905 -- should be adopted.[19]

The Companies propose to determine how significantly excess earnings would be tested under the provisions in S.B. 221 as part of its Short-Term ESP Proposal.[20] The test for whether utilities are making significantly excess earnings is a key element of customer protection in S.B. 221. As stated by Staff Witness Cahaan, the complete determination of the method by which Ohio utilities have a return on common equity "significantly in excess" of those companies having "comparable business and financial

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[17] Application, approval of ¶A.3.e. through A.3.k.

[18] Id. at 21, ¶A.3.e.

[19] Staff Witness Fortney Testimony at 6 (Fortney).

[20] Application, approval of ¶A.7.d.

risk"[21] would be premature as part of an initial ESP reviewed during 2008.[22] A test is not needed immediately since it would first be applied in 2010 for the annual evaluation of ESP results from 2009.[23] The matter requires additional study and evaluation by the Commission, as stated by Staff Witness Cahaan,[24] and should certainly not be approved as part of a *short*-term ESP.

FirstEnergy is impertinent in its demand that any adjustment to the ESP, in the event of alterations to the Companies' terms or a successful appeal to the Supreme Court of Ohio, must maintain the Companies' profitability.[25] The Companies essentially ask that the Commission agree at this early juncture that opinions by the PUCO and/or the Court should bow to the Companies' demands. The Companies' demands could ultimately result in asking the PUCO to defy an opinion by the Supreme Court of Ohio in an appeal, a direction that cannot be lawfully undertaken by the Commission.

B. An Effective Short-Term ESP Requires the Commission to Set Reasonable Terms for SSO Service and to Fully Compensate FirstEnergy.

The modification of FirstEnergy's ESP should provide rates until such time that FirstEnergy makes further application for PUCO approval to meet its obligation to "provide consumers, on a comparable and nondiscriminatory basis . . . a standard service offer of all competitive retail electric services necessary to maintain essential electric

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[21] R.C. 4928.143(F).

[22] Staff Witness Cahaan Testimony at 5-6 ("bad venue").

[23] R.C. 4928.143(F) ("following the end of each annual period of the plan").

[24] Staff Witness Cahaan Testimony at 5-6 ("workshop or technical conference").

[25] Application, approval of ¶A.7.h.

service to consumers, including a firm supply of electric generation service."[26] Distribution service will be provided according to rates determined in FirstEnergy's pending *Distribution Rate Case.*

FirstEnergy has proposed high generation rates in its ESP Application, and even *higher* rates for the beginning of 2009 in the Companies' Short-Term ESP Proposal that is part of the overall ESP Application. FirstEnergy's customers already have the dubious distinction of paying the highest electricity rates in Ohio, and the Companies' proposals would exacerbate that situation. Additionally, great diversity in rate changes within customer classes would result from FirstEnergy's ESP proposal.[27] These rate design concerns further support establishing a longer period during which FirstEnergy's proposals can be reviewed under requirements set in the Commission's recently approved rules.[28] The Commission should, for many reasons, modify the proposals set out in the Companies' Application.

One means by which the Commission can effectively provide for the required generation service is to modify FirstEnergy's ESP proposal to require FirstEnergy to purchase generation and related services required by R.C. 4928.141(A) from the day-ahead Midwest Independent System Operator ("MISO") market. The trend line for day-ahead generation prices shows that averaging short-run results would result in reasonable short-term rates even without the recent declines in energy prices.[29] Retail rates based

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[26] R.C. 4928.141(A).

[27] Tr. Vol. IV (October 21, 2008) (Higgins).

[28] *MRO and ESP Rulemaking*, Case No. 08-777-EL-SSO, Order (September 17, 2008).

[29] OCC Ex. 3 at 17-20 (Yankel).

upon purchases in the day-ahead market should be acceptable, in part because of the decline in electricity prices. OEG Witness Baron reports that prices have declined considerably from those on July 15, 2008 (i.e. from the base date used by FirstEnergy Witnesses Graves and Jones), trending lower along with generally lower energy prices.[30] Short-term generation rates should therefore result in prices considerably lower than the 7.75 cents per kilowatt-hour offered in FirstEnergy's Short-Term ESP Proposal.[31] The duration of such purchases and related charges for FirstEnergy's customers should be the 270-day period to permit consideration of a second ESP application[32] or the implementation date following Commission approval of a SSO plan for FirstEnergy, whichever is sooner.[33]

The modified ESP could provide rates for all FirstEnergy customers by means of a Purchased Power Adjustment ("PPA") mechanism. A PPA would be calculated on a

[30] OEG Witness Baron Testimony at 13-14 (OEG Ex. 1). According to OEG Witness Baron, prices dropped approximately 15 percent using forward prices on September 19, 2008 rather than July 15, 2008. The updated forward prices presented by OEG Witness Baron for October, the latest available in the record, are approximately 24 percent below those for July 15, 2008. Id., Updated Exhibits (OEG Ex. 1-A).

[31] Application at 37. The updated tables from OEG Witness Kollen revise FirstEnergy Ex. 1-A, Alternate Attachment 1, page 1 of 4 (an attachment to FirstEnergy Witness Blank Testimony) using updated price information for October 2008. The results -- which do not include other criticisms of FirstEnergy's evaluations -- show that the ESP is less favorable in the aggregate than the alternative by $452.2 million compared to a net benefit of $1,008.3 million in FirstEnergy's calculations based upon July 15 prices. Attachments to OEG Witness Kollen Testimony, OEG Ex. 2-A (LK-9A).

[32] R.C. 4928.143(C)(1).

[33] Staff Witness Johnson offered his view on generation pricing for the time period proposed by FirstEnergy in its Short-Term ESP Proposal. Tr. Vol. X (October 29, 2008). Mr. Johnson opined that FirstEnergy should charge 6.75 cents per kilowatt-hour during the first few months of 2009. Id. Mr. Johnson did not, however, provide an opinion regarding important implementation matters. Id. While Mr. Johnson stated that his opinion reflected recent declines energy prices, the stated basis for his 6.75 cent figure involved the relationship between the Companies' rate plan offer in 2004 compared with auction prices in 2004 . Id. Energy prices had not similarly declined before the time when the 2004 auction was conducted, so a decline in prices was apparently not a factor upon which Mr. Johnson's opinion was based.

monthly basis and applied using the existing FirstEnergy rate structure[34] with equal percentage changes to all rates (i.e. initially for decreases) as needed to provide the funds to compensate FirstEnergy for the purchases. FirstEnergy's reasonable and prudent expenditures to administer the modified SSO program would be reimbursed as part of the PPA. The costs of the program could be monitored and audited by the PUCO Staff or by an outside auditor.[35]

The Revised Code provides for the contingencies involved in the modification of FirstEnergy's ESP proposal. One contingency involves FirstEnergy's acceptance of the modified plan. Under those circumstances, a plan must be placed into effect to provide electric service by the end of the 270-day period for the short-term ESP. While short, this period is sufficiently long to permit Commission consideration of a SSO proposal in a form proposed by FirstEnergy.

In the event FirstEnergy rejects the modified plan, the Revised Code provides for that contingency:

> If the commission modifies and approves an application . . . the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section [4928.143 ESP] or a standard service offer under section 4928.142 [MRO] of the Revised Code.[36]

Further, the Revised Code provides for rates in conjunction with FirstEnergy's termination of the Commission's modifications.

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[34] OCEA does not argue or concede that FirstEnergy's existing rate structure is appropriate.

[35] The PPA mechanism is similar to the methodology recommended as a short-term approach by OEG Witness Baron. OEG Witness Baron Testimony at 12-13. Some differences exist. For example, there does not appear to be any compelling need to start with existing prices. Id. at 12-13. The lower level of prices in the day-ahead MISO market should be recognized in the Commission's order.

[36] R.C. 4928.143(C)(2)(a).

> If the utility terminates an application pursuant to (C) (2) (a) of this section . . . the commission shall issue such order as is necessary to continue the provisions, terms, and condition 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, until a subsequent offer is authorized pursuant to this section or section 4928.141 of the Revised Code, respectively.[37]

Since FirstEnergy has no generating units and therefore has no fuel costs, no adjustments to current rates should be made in the event FirstEnergy terminates the modified rate plan. The resulting rates would fully compensate FirstEnergy since the rates would result from the Companies' choice over a PPA procedure that fully compensates the electric distribution utilities for their costs of operation.[38] The result is again short-term rates for a period that would not exceed 270 days.

III. CONCLUSION

Customers would be harmed by adoption of the Companies' Short-Term ESP Proposal because it would require the approval of many undesirable parts of the Companies' longer-term ESP proposal. Such action would defeat any purpose for a short-term ESP. An important term in FirstEnergy's Short-Term ESP Proposal -- the Commission's determination that distribution rates be decided in the ESP proceeding and not in the *Distribution Rate Case* -- has already been rejected by the Commission.

A short-term ESP should be established on more reasonable grounds than is proposed in the Companies' Application. One means of proceeding would be for the PUCO to order the PPA as a modification to FirstEnergy's ESP proposal. The PPA

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[37] R.C. 4928.143(C)(2)(b).

[38] This feature is missing, for example, by the Commission ordering an aggregate generation rate of 6.75 cents per kilowatt-hour, as proposed by Staff Witness Johnson. Tr. Vol. X (October 29, 2008) (Johnson).

would permit the collection of sufficient revenues to prevent any unconstitutional "taking" from the Companies. Rejection of the short-term ESP by FirstEnergy would result in the short-term continuation of existing rates, which would be preferable to FirstEnergy's Short-Term ESP Proposal. With additional time, an improved and longer-term SSO plan could be analyzed and refined for approval by the Commission.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record
Jacqueline Lake Roberts
Richard C. Reese
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
small@occ.state.oh.us
roberts@occ.state.oh.us
reese@occ.state.oh.us
poulos@occ.state.oh.us

A Porter by JLS

Gregory J. Dunn
Andre T. Porter
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Attorney for the City of Cleveland

T. Robinson by JLS

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217

Attorney for Citizen Power

D. Rinebolt by JLS

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima St., P.O. Box 1793
Findlay, OH 45839-1793
419-425-8860 (Telephone)

Ohio Partners for Affordable Energy

J. Meissner by JLS

Joseph Meissner,
The Legal Aid Society of Cleveland
1223 West 6th St.
Cleveland, OH 44113

Attorney for Citizens Coalition,
Citizens for Fair Utility Rates,
Neighborhood Environmental Coalition,
Cleveland Housing Network, and
Empowerment Center for Greater Cleveland

H. Eckhart by JLS

Henry W. Eckhart
50 W. Broad St., #2117
Columbus, OH 43215

Attorney for The Sierra Club Ohio Chapter
and Natural Resources Defense Council

L. Keiffer by JLS

Lance M. Keiffer, Asst. Prosecutor
711 Adams Street, 2nd Floor
Toledo, OH 43624-1680

Attorney for NOAC

L. Kovacik by JLS

Leslie A. Kovacik
Dept. of Law
420 Madison Ave., 4th Fl.
Toledo, OH 43604-1219

Attorney for NOAC

G. Krassen by JLS

Glenn Krassen
Bricker & Eckler LLP
1375 East Ninth St., Ste. 1500
Cleveland, OH 44114

Attorney for Northeast Ohio Public Energy Council

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing the OCEA's Brief Regarding a Short-Term Electric Security Plan was served by first class United States Mail, postage prepaid, to the persons listed below, on this 31st day of October 2008.

Jeffrey L. Small
Assistant Consumers' Counsel

PERSONS SERVED

David F. Boehm
Boehm, Kurtz & Lowry
36 East Seventh St., Ste. 1510
Cincinnati, OH 45202

Attorney for Ohio Energy Group

John W. Bentine
Chester, Willcox & Saxbe LLP
65 East State St., Ste. 1000
Columbus, OH 43215-4213

Attorney for The Kroger Company, Inc.

Barth E. Royer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Attorney for The Ohio Environmental Council and Dominion Retail, Inc.

John Jones
William Wright
Assistant Attorneys General
Public Utilities Commission of Ohio
180 E. Broad St., 9th Fl.
Columbus, OH 43215

Samuel C. Randazzo
Lisa McAlister
Daniel Neilsen
Joseph Clark
McNees, Wallace & Nurick LLC
21 East State St., 17th Fl.
Columbus, OH 43215

Attorney for Industrial Energy Users-Ohio

Christopher Miller
Schottenstein, Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215

Attorney for The AICUO

James W. Burk
Arthur E. Korkosz
Mark A. Hayden
Ebony L. Miller
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308

Craig I. Smith
2824 Coventry Road
Cleveland, OH 44120

Attorney for Material Sciences Corporation

Douglas M. Mancino
McDermott, Will & Emery LLP
2049 Century Park East, Ste. 3800
Los Angeles, CA 90067-3218

Attorney for Morgan Stanley Capital Group, Inc.

Garrett Stone
Brickfield, Burchette, Ritts & Stone
1025 Thomas Jefferson St., N.W.
8th West Tower
Washington, D.C. 20007

Attorney for Nucor Steel Marion, Inc.

M. Howard Petricoff
Vorys, Sater, Seymour And Pease LLP
52 East Gay S., P. O. Box 1008
Columbus, OH 43216-1008

Attorney for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Direct Energy Services, LLC and Integrys Energy Services, Inc.

Cynthia A. Fonner
David Fein
Constellation Energy Group, Inc.
550 W. Washington St., Suite 300
Chicago, IL 60661

Attorney for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.

Mark A. Whitt
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017

Richard L. Sites
General Counsel and Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Gregory K. Lawrence
McDermott, Will & Emery LLP
28 State Street
Boston, MA 02109

Attorney for Morgan Stanley Capital Group, Inc.

Craig G. Goodman
National Energy Marketers Association
3333 K St., N.W., Ste. 110
Washington, D.C. 20007

Sean W. Vollman
David A. Muntean
Assistant Directors of Law
161 S. High Street, Suite 202
Akron, OH 44308

Attorney for City of Akron

Eric D. Weldele
Tucker Ellis & West LLP
1225 Huntington Center
41 South High Street
Columbus, OH 43215

Attorney for Council of Smaller Enterprises

Dane Stinson
Bailey Cavalieri LLC
10 West Broad St. Ste. 2100
Columbus, OH 43215

Attorney for FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC

Larry Gearhardt
Chief Legal Counsel
Ohio Farm Bureau Federation
280 North High St., P.O. Box 182383
Columbus, OH 43218-2383

Damon E. Xenopoulos
Brickfield, Burchette, Ritts & Stone, PC.
1025 Thomas Jefferson Street, N.W.
Eighth Floor, West Tower
Washington, DC 20007

Attorney for OmniSource Corporation

Grace C. Wung
McDermott Will & Emery, LLP
600 Thirteenth Street, N.W.
Washington, DC 20005

Attorney for the Commercial Group

R. Mitchell Dutton
FPL Energy Power Marketing, Inc.
700 Universe Boulevard
CTR/JB
Juno Beach, FL 33408

Attorney for FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC

Langdon D. Bell
Bell & Royer Co., LPA
33 South Grant Ave.
Columbus OH 43215-3927

Attorney for Ohio Manufacturer's Association

sam@mwncmh.com
john.jones@puc.state.oh.us
william.wright@puc.state.oh.us
drinebolt@aol.com
dboehm@bkllawfirm.com
BarthRoyer@aol.com
jbentine@cwslaw.com
Cynthia.A.Fonner@constellation.com
mhpetricoff@vssp.com
gas@bbrslaw.com
leslie.kovacik@toledo.oh.gov
lkeiffer@co.lucas.oh.us
mitch.dutton@fpl.com
LBell33@aol.com
robinson@citizenpower.com
lmcalister@mwncmh.com
jclark@mwncmh.com
dneilsen@mwncmh.com
Dane.Stinson@BaileyCavalieri.com

burkj@firstenergycorp.com
korkosza@firstenergycorp.com
haydenm@firstenergycorp.com
elmiller@firstenergycorp.com
mawhitt@jonesday.com
ricks@ohanet.org
henryeckhart@aol.com
cgoodman@energymarketers.com
Vollmse@ci.akron.oh.us
jpmeissn@lasclev.org
LGearhardt@ofbf.org
gkrassen@bricker.com
gdunn@szd.com
dex@bbrslaw.com
wis29@yahoo.com
eric.weldele@tuckerellis.com
david.fein@constellation.com
gwung@mwe.com
cmiller@szd.com