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**JOINT MOTION TO DISMISS OF OHIO POWER COMPANY  
AND THE PUBLIC UTILITIES COMMISSION OF OHIO**

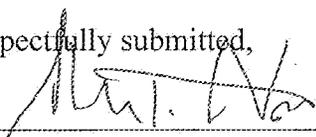
Pursuant to S.Ct.Prac.R. 4.01, Appellee/Cross-Appellant Ohio Power Company (“AEP Ohio”) and Appellee the Public Utilities Commission of Ohio (“Commission”) respectfully move the Court to dismiss certain Propositions of Law raised in these appeals from the Commission. After reviewing Appellants’ merit briefs, it has become evident to AEP Ohio and the Commission that some of Appellants’ claims should be dismissed. This is an involved utility appeal with multiple issues for the Court’s consideration. The presentation to the Court in both the merit briefing and oral argument should not include moot issues or issues not properly preserved for the Court’s review. This Court should dismiss the Propositions of Law outlined in this Motion to ensure that the docket is focused on the appropriate issues. The Propositions of Law that AEP Ohio and the Commission now ask the Court to dismiss fall into two categories.

First, Propositions of Law Nos. 6, 7, and 8 advanced by Appellant Industrial Energy Users-Ohio (“IEU-Ohio”) are moot. These three Propositions relate only to *interim* rates that the Commission set for capacity service during the underlying proceeding. Those rates are no longer effective, are no longer being collected, and have been replaced by other rates. The interim rates were never stayed pending appeal or otherwise (nor was the required bond or other undertaking executed). Attempting to avoid mootness, IEU-Ohio urges that it seeks “rough justice” in the form of a refund of sums already paid by competitive retail electric service (“CRES”) providers. But the prohibition against retroactive ratemaking precludes that relief.

Second, the Court should dismiss Proposition of Law No. 2 advanced by Appellant Office of the Ohio Consumers’ Counsel (“OCC”). OCC argues that the Commission cannot permit a utility to defer the difference between its cost of capacity and the wholesale rate that it charges CRES providers because that allegedly would cause customers to pay for capacity twice.

But the deferral mechanism was not established in the underlying docket. It was established in the separate *ESP II* proceeding. Consequently, OCC's Proposition of Law No. 2 should be dismissed and addressed in the pending *ESP II* appeal, Supreme Court Case No. 2013-0521, where OCC has raised the same issue. A Memorandum in Support is attached.

Respectfully submitted,

  
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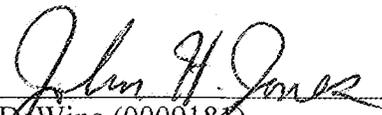
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**MEMORANDUM IN SUPPORT OF  
JOINT MOTION TO DISMISS OF  
OHIO POWER COMPANY AND  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

AEP Ohio and the Commission respectfully submit this Memorandum in Support of their Joint Motion to Dismiss IEU-Ohio's Propositions of Law Nos. 6, 7, and 8, and OCC's Proposition of Law No. 2. Prompt dismissal of these improper Propositions of Law will enable the parties to focus their briefs, and the Court to focus its attention, on only those issues properly before the Court.

In its July 16, 2013 Amended Motion to Dismiss, AEP Ohio asked this Court to dismiss portions of Appellants' appeals. AEP Ohio stands by its Amended Motion, which remains pending. Now that AEP Ohio and the Commission have reviewed Appellants' Merit Briefs, it is apparent to AEP Ohio and the Commission that still other Propositions of Law should be dismissed to ensure that this Court does not devote time and resources addressing the merits of issues that are moot or otherwise not properly preserved for appeal. *First*, IEU-Ohio's Propositions of Law Nos. 6, 7, and 8 are moot. These Propositions improperly seek to challenge *interim* rates for capacity that the Commission set on a short-term basis during the pendency of the underlying proceedings – rates that have expired, been replaced by other rates, and were never stayed pending appeal. *Second*, OCC's Proposition of Law No. 2 should be dismissed because the issue OCC seeks to raise – whether the Commission can permit AEP Ohio to defer the difference between its cost of capacity and the wholesale discounted rate that it charges competitive retail electric service (“CRES”) providers – was resolved by the Commission in the

separate *ESP II* docket.<sup>1</sup> The Commission's orders in the *ESP II* case have been separately appealed to this Court in Case No. 2013-0521, and OCC has challenged the deferral mechanism in its Notice of Appeal filed in that case. Consequently, OCC's Proposition of Law No. 2 is appropriately addressed in that appeal.

## ARGUMENT

### A. **The Mootness Doctrine And The Prohibition Against Retroactive Ratemaking Compel Dismissal Of IEU-Ohio's Propositions Of Law No. 6, 7, And 8, Which All Relate To Now-Expired Interim Rates That IEU-Ohio Never Stayed, And Which Ask This Court For Relief (A Refund) That It Cannot Legally Provide.**

#### 1. Background

IEU-Ohio's Propositions of Law Nos. 6, 7, and 8 all attack *interim* rates for capacity that are no longer being charged. In a February 2012 Motion for Relief filed with the Commission in the underlying *Capacity Case*, AEP Ohio proposed using, on an interim basis, a two-tiered capacity pricing mechanism contemplated by a Joint Stipulation and Recommendation dated December 2011 in connection with the *ESP II* case. (*See Capacity Case*, AEP Ohio Mot. for Relief (February 27, 2012); *see also Capacity Case*, Entry (January 23, 2012) ("January 23 Entry").) The Commission granted AEP Ohio's Motion. (*See Capacity Case*, Entry (March 7, 2012) ("March 7 Entry").) The Commission concluded that reverting from the capacity pricing structure that it previously established in its January 23 Entry to a state compensation mechanism based exclusively on PJM Interconnection, LLC ("PJM") reliability pricing model ("RPM") auction pricing could risk an unjust and unreasonable result. Accordingly, the Commission

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<sup>1</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, PUCO Case Nos. 11-346-EL-SSO & 11-348-EL-SSO; *In the Matter of the Application of Columbus Southern Power Company for Approval of Certain Accounting Authority*, PUCO Case Nos. 11-349-EL-AAM & 11-350-EL-AAM.

confirmed that, for the relatively short interim period during which the Commission continued to consider what a just and reasonable capacity pricing structure would be for the longer term, AEP Ohio should continue to charge CRES providers for capacity in accordance with the January 23 Entry.<sup>2</sup>

That interim capacity pricing mechanism was originally set to expire on May 31, 2012. On May 30, 2012, AEP Ohio sought a temporary extension of the interim rates because it was apparent that the Commission would not be able to issue an opinion on the merits of the *Capacity Case* by then. (See *Capacity Case*, Entry at 7-8 (May 30, 2012).) In its May 30 Entry, the Commission agreed, noting that “[t]he circumstances faced by AEP Ohio that prompted the Commission to approve the request for interim relief have not changed.” (*Id.* at 7.) The Commission thus determined that the interim capacity rates put into effect by the March 7, 2012 Entry would continue “until July 2, 2012, unless the Commission issues its order in this case.” (*Id.* at 8.)

On July 2, 2012—the same day the interim rates were set to expire—the Commission issued its Opinion and Order in the *Capacity Case* now under review, finding that the record supported compensation of \$188.88/MW-day. (*Capacity Case*, Opinion and Order at 33 (July 2, 2012).) But the Commission deferred implementation of that rate, ordering that:

the interim capacity pricing mechanism approved on March 7, 2012, and extended on May 30, 2012, shall remain in place until the earlier of August 8, 2012, or such time as the Commission issues its opinion and order in [AEP Ohio’s *ESP II* proceeding, PUCO Case No.] 11-346, at which point the state compensation mechanism approved herein shall be incorporated into the rates to be effective pursuant to that order.

(*Id.* at 38.)

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<sup>2</sup> The Commission’s conclusions regarding the interim capacity charge were well supported by the record. (*Capacity Case*, March 7 Entry at 15-17.)

On August 8, 2012, the Commission issued its Opinion and Order in the *ESP II* proceeding. There, the Commission directed AEP Ohio to file proposed, final tariffs reflecting the authorized rates by no later than August 16, which the Company did. (*ESP II*, Opinion and Order at 79 (Aug. 8, 2012); *see also ESP II*, Tariff Compliance Letter (Aug. 16, 2012).) Shortly thereafter, the Commission issued its Entry approving the proposed compliance rates and tariffs filed by the Company, effective for bills rendered beginning with the first billing cycle of September 2012. (*See Capacity Case*, Entry (Aug. 22, 2012).)

As that procedural history demonstrates, AEP Ohio has not charged any CRES providers (including IEU-Ohio) the interim capacity prices since August 2012, when the interim capacity pricing mechanism expired and was replaced by the rates authorized by the Commission in the *ESP II* proceeding. Although IEU-Ohio sought rehearing with respect to the March 7 and May 30 Commission Entries described above, raising some of the same challenges to the interim capacity rates that IEU-Ohio raises here in this Court, IEU-Ohio never requested, let alone obtained, a stay of the March 7 or May 30 Entries establishing and continuing the interim capacity pricing mechanism. Nor has it ever posted any bond or undertaking required to obtain a stay pursuant to R.C. 4903.16.

IEU-Ohio nonetheless improperly seeks an advisory opinion of this Court by challenging the Commission's March 7 and May 30 Entries authorizing interim rates in its Propositions of Law Nos. 6, 7, and 8. (IEU-Ohio Merit Br. at 42-46.)<sup>3</sup> Recognizing that the rates are no longer being charged, IEU-Ohio asserts that AEP Ohio should "refund" a "portion of capacity charges

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<sup>3</sup> In its Proposition of Law No. 6, IEU-Ohio contends that the Commission's March 7 and May 30, 2012 Entries are unlawful and unreasonable. (IEU-Ohio Merit Br. at 42-43.) In its seventh Proposition of Law, IEU-Ohio complains that the interim rates were not based upon the record from the capacity proceeding. (*Id.* at 43-45.) And in its Proposition of Law No. 8, IEU-Ohio posits that the Court should direct the Commission to refund what IEU-Ohio characterizes as the "above-market charges AEP Ohio collected" while interim rates were in place. (*Id.* at 45-46.)

in place since January 2012 or credit the excess collection against regulatory asset balances otherwise eligible for amortization through retail rates and charges.” (*Id.* at 45.) IEU-Ohio thus seeks a refund for rates that are no longer being collected and that were already paid, or “some ‘rough justice’” in the form of credits against regulatory asset balances.” (*Id.* at 46.)

**2. IEU-Ohio’s Propositions of Law No. 6, 7, And 8 Should Be Dismissed.**

Appellate courts may review only live controversies. As a result, when circumstances prevent an appellate court from granting relief, the mootness doctrine precludes consideration of the issues in the case. As this Court explained:

That an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot is a proposition of law that harks back almost a century. *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 2d, 8 Ohio L. Rep. 71 (involving a completed annexation), followed by *Hagerman v. Dayton* (1947), 147 Ohio St. 313, 325-326, 34 O.O. 238, 71 N.E.2d 246 (involving payroll deductions).

This proposition of law has long been applied to appeals from commission orders. In 1916, the court held that when a commission order had been carried out, no stay had been granted, and there was nothing left upon which the court’s decision could operate, the appeal was moot and should be dismissed. *Pollitz v. Pub. Util. Comm.* (1916), 93 Ohio St. 483, 113 N.E. 1071, 13 Ohio L. Rep. 588. A later case involved an appeal of a commission order allowing a railroad to cease operation. *Travis v. Pub. Util. Comm.* (1931), 123 Ohio St. 355, 9 Ohio Law Abs. 443, 175 N.E. 586. After the commission’s order was entered, the railroad’s assets were dismantled and sold, and its employees were discharged. This court dismissed the appeal because any order the court could have issued would have been a vain act; no order of the court could have reconstituted the railroad. *Id.* at 359, 175 N.E. 586.

*Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 15-16.

In *Cincinnati Gas & Electric*, this Court held that mootness precluded the utility from challenging the reasonableness or lawfulness of a Commission order requiring the utility to provide a village with certain customer information. *Id.* The village filed testimony indicating

that the utility had, in fact, already complied with the Commission's orders and provided the village with the requested information; this Court concluded that the utility's appeal was moot as a result. "In the absence of the possibility of an effective remedy, this appeal constitutes only a request for an advisory ruling from the court." *Id.* at ¶ 17.

Here, too, IEU-Ohio can no longer challenge the interim rates. Those rates have come and gone. This Court cannot reinstitute a long-since expired rate so as to permit itself to grant the relief of invalidating it as unreasonable. Nor can mootness be avoided by demanding, as IEU-Ohio does, that AEP Ohio refund any sums already collected (whether termed "rough justice" or otherwise). Even where (unlike here) rates are actually still being collected, such retroactive refunds are barred by the prohibition against retroactive ratemaking: "The rule against retroactive rates \*\*\* also prohibits its refunds." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 15. As this Court explained:

As OCC recognizes, \*\*\* we have consistently held that the law does not allow refunds in appeals from commission orders. As we stated only two years ago, "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21.

*Id.* at ¶ 16; see also *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in [*Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957)].")

IEU-Ohio's effort to press its three moot Propositions before this Court is particularly inappropriate given IEU-Ohio's failure to comply with R.C. 4903.16 so as to obtain a stay of the interim rates pending appeal. That statute provides:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme

court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

R.C. 4903.16. "From this section it is clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond." *Keco, supra*, 166 Ohio St. at 257. IEU-Ohio, though allegedly aggrieved by the Commission's interim capacity rates, never posted any bond or obtained any stay of those rates, even though such tools were available to IEU-Ohio if it wanted to use them. As such, IEU-Ohio's Propositions of Law challenging the interim rates are jurisdictionally defective and should be dismissed. *Travis v. Public Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586 (1931) (error asserted by party not seeking a stay must be dismissed once reversal of the order could not have any effect)); *see also In re Columbus S. Power Co., supra*, 2011-Ohio-1788, ¶ 18-20 (denying refund request where OCC failed to post bond or stay the order pending appeal).

Although there is a recognized exception to the mootness doctrine for issues "capable of repetition, yet evading review," the Propositions of Law at issue here are well beyond it. The exception "applies only in exceptional circumstances in which the following factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000-Ohio-142, 729 N.E.2d 1182. Here, neither factor applies. IEU-Ohio had

more than enough time to seek a stay and post an adequate bond necessary to challenge the disputed interim capacity rate during the pendency of the proceedings below, and there is no plausible expectation that IEU-Ohio will ever again be subject to the same interim rate for capacity at any foreseeable time in the future. Besides, the capable-of-repetition yet-evading review exception would, at most, allow this Court to articulate the law governing the issue; it would not allow this Court to order relief – such as an impermissible retroactive refund – that is otherwise proscribed. As such, IEU-Ohio’s Propositions of Law Nos. 6, 7, and 8 are moot and should be dismissed.

**B. OCC’s Proposition Of Law No. 2 Should Be Dismissed Here In The *Capacity Case* And Considered Instead In The Pending *ESP II* Appeal Where OCC Has Preserved The Issue In Its Notice Of Appeal.**

OCC’s Proposition of Law No. 2 challenges the Commission’s decision to allow AEP Ohio to defer, for later recovery, certain incurred capacity costs not recovered from CRES providers. (OCC Merit Br. at 19-20.) In its July 2, 2012 Opinion and Order in the *Capacity Case*, the Commission determined that \$188.88 per MW-day was the just and reasonable charge to enable the Company to recover its capacity costs from CRES providers. (*See Capacity Case*, Order at 33-36 (July 2, 2012).) To promote competition, however, the Commission determined that AEP Ohio’s capacity charge to CRES providers should be the auction-based rate, as determined by the PJM RPM. (*Id.* at 23.) The Commission authorized AEP Ohio to modify its accounting procedures to defer for later recovery the incurred capacity costs not recovered from CRES providers:

[T]he Commission will authorize AEP Ohio to modify its accounting procedures, pursuant to Section 4905.13, Revised Code, to defer incurred capacity costs not recovered from CRES provider billings during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve below. Moreover, *the Commission notes that we will establish an*

*appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding.*

(*Id.*) (emphasis added). The Commission thus expressly stated that the recovery mechanism would be established in the *ESP II* proceeding, yet OCC attempted to challenge the recovery mechanism in an application for rehearing in the *Capacity Case*. (See *Capacity Case*, OCC Application for Rehearing at 18-20 (Aug. 1, 2012).) But the Commission declined to address OCC's arguments:

The Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate recovery mechanism would be established in the *ESP 2 Case* and that any other financial considerations would also be addressed by the Commission in that case. The Commission finds it unnecessary to address arguments that were raised in this proceeding merely as an attempt to anticipate the Commission's decision in the *ESP 2 Case*. Accordingly, the requests for rehearing or clarification should be denied.

(See *Capacity Case*, Entry on Rehearing at 51 (Oct. 17, 2012).)

OCC now seeks to challenge deferral recovery mechanism on review of the Commission's order in its Proposition of Law No. 2. Specifically, OCC takes issue with the Commission's decision that AEP Ohio's deferred capacity costs should be recovered in the future from both shopping and non-shopping customers, arguing that that decision will require non-shopping customers to "pay twice for capacity." (See OCC Merit Br. at 19.) But that issue is not properly considered in this appeal, because the Commission did not actually establish the deferral recovery mechanism challenged by OCC in the order under review here. Instead, as the Commission's July 2, 2012 Opinion and Order in the *Capacity Case* directed, the Commission established the challenged recovery mechanism in the *ESP II* case, where OCC has already lodged a separate appeal to this Court on the same issue. (See Ohio Supreme Court Case No. 2013-0521, OCC Notice of Appeal (May 23, 2013).) The appeal from the *ESP II* proceeding – not this appeal – is thus the proper vehicle for addressing the merits of OCC's challenge to the

deferral recovery mechanism established in the *ESP II* proceeding. Moreover, OCC separately launches its challenge to the deferral itself, in Proposition of Law No. 3; while AEP Ohio and the Commission will refute the merits of that claimed error in their merit briefs, the Company and the Commission do not contest OCC's ability to pursue that challenge because it relates to a matter actually decided in the proceeding below.

But this Court thus should not address the merits of OCC Propositions of Law No. 2 challenging actions that the Commission did not actually take in the proceeding being appealed from. Were the rule otherwise, the Court's Rules of Practice governing the record on appeal and the arguments to include in merit briefs would make little sense, and the Court would be forced to issue advisory opinions concerning the reasonableness and lawfulness of Commission actions not actually taken in the proceeding being appealed from. *See State ex rel. Davis v. Pub. Empl. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 41-43 (declining to address issues concerning entitlement to retirement service credits before those issues had been administratively determined, noting that "[w]e will not issue an advisory opinion on these issues before they are properly before us"). OCC will in no way be prejudiced if the Court dismisses OCC's Proposition of Law No. 2 from this appeal: OCC has already raised an identical challenge to the deferral recovery mechanism in its Notice of Appeal in the *ESP II* case.<sup>4</sup>

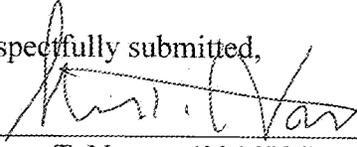
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<sup>4</sup> OCC's Notice of Appeal in the *ESP II* case asserts that the "PUCO erred in unreasonably and unlawfully authorizing Ohio Power Company to collect from all retail customers (as part of the retail stability rider) the estimated \$647 million difference between its cost of capacity and the discounted wholesale capacity rate it charges Competitive Retail Electric Service ("CRES") providers." (Ohio Supreme Court Case No. 2013-0521, OCC Notice of Appeal at 2 (May 23, 2013).) It continues: "The PUCO had no jurisdiction under Chapter 4928 to authorize such a collection. Moreover, permitting the utility to charge retail customers for the wholesale capacity discount to CRES providers will cause non-shopping customers to pay twice for capacity—a result that is unjust, unreasonable, contrary to public policy, and unlawful, violating R.C. 4928.141, R.C. 4928.02, and tariffs approved by the Federal Energy Regulatory Commission." (*Id.*)

## CONCLUSION

Upon reviewing Appellants' merit briefs, it has become apparent that some of the claims being advanced should be dismissed – beyond the claims that were the subject of AEP Ohio's July 16, 2013 Amended Motion to Dismiss and for separate reasons, as discussed above. Accordingly, AEP Ohio and the Commission respectfully ask this Court to dismiss IEU-Ohio's Propositions of Law Nos. 6, 7, and 8 and OCC's Proposition of Law No. 2. Prompt dismissal of these improper Propositions of Law will enable the parties to focus their remaining briefs, and the Court to focus its attention on, only those issues that are properly before the Court. This is especially appropriate given the plethora of claims advanced by IEU-Ohio that will otherwise be addressed in the Second and Third Briefs.

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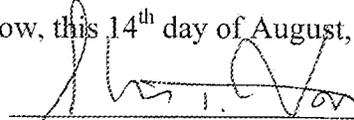
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**PROOF OF SERVICE**

I certify that the foregoing *Joint Motion to Dismiss of Ohio Power Company and the Public Utilities Commission of Ohio* was served by First-Class U.S. Mail or hand delivery upon counsel for parties to this proceeding, identified below, this 14<sup>th</sup> day of August, 2013.

  
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