

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Columbus Southern Power Company and	)	
Ohio Power Company for Authority to	)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer	)	Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,	)	
in the Form of an Electric Security Plan	)	
In the Matter of the Application of	)	
Columbus Southern Power Company and	)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of	)	Case No. 11-350-EL-AAM
Certain Accounting Authority	)	

**FIRSTENERGY SOLUTIONS CORP.'S MOTION TO STRIKE  
TESTIMONY OF AEP OHIO WITNESS R. HAWKINS**

Pursuant to Rules 4901-1-12 and 4901-1-27 of the Ohio Administrative Code and the Attorney Examiner's April 26, 2012 Entry, FirstEnergy Solutions Corp. ("FES") requests that certain portions of the testimony of Ohio Power Company ("AEP Ohio") witness Renee Hawkins be stricken from the record. As set forth in the attached memorandum in support, which is incorporated herein, Ms. Hawkins attempts to incorporate hearsay documents<sup>1</sup> and offer other speculative testimony for which she has no foundation<sup>2</sup> -- and none of which is relevant in any event. Accordingly, these segments of Ms. Hawkins' testimony should be stricken.

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<sup>1</sup> See Testimony of R. Hawkins, filed Mar. 30, 2012, pp. 10:20-12:18, and Exh. RWH-6.

<sup>2</sup> *Id.* at p. 12:19-31.

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MEMORANDUM IN SUPPORT OF  
FIRSTENERGY SOLUTIONS CORP.'S MOTION TO STRIKE  
TESTIMONY OF AEP OHIO WITNESS R. HAWKINS

On March 30, 2012, Ohio Power Company (“AEP Ohio”) filed testimony in support of its modified electric security plan proposal (the “Modified ESP”). AEP Ohio’s testimony included testimony offered by witness Renee Hawkins. However, certain portions of Ms. Hawkins’ testimony are improper and inadmissible. Ms. Hawkins attempts to submit the hearsay statements of others for whom neither Intervenors nor Staff (nor the Commission) will have the opportunity to cross-examine. Ms. Hawkins also attempts to submit speculative testimony regarding the basis for other entities’ actions, for which she has no personal knowledge. Accordingly, as set forth further herein, these portions of Ms. Hawkins’ testimony must be stricken.

## LAW & ARGUMENT

### **A. Ms. Hawkins Incorporates Inadmissible (And Prejudicial) Hearsay And She Lacks Foundation For Certain Speculative Portions Of Her Testimony.**

#### **1. Ms. Hawkins' attempts to incorporate hearsay statements made by non-party rating agencies are prejudicial and improper.**

Starting at page 10, line 20 and continuing through page 12, line 18, Ms. Hawkins summarizes, attaches,<sup>3</sup> and re-types the reports of certain rating agencies. She is not an author of any of the reports and she provides no evidence that she had any involvement in preparing the reports (nor would it be expected that she did). Rather, the reports represent the inadmissible hearsay statements and thoughts of various rating agencies.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>4</sup> Unless hearsay falls within one of the enumerated exceptions to the Hearsay Rule in Evidence Rule 803 or 804, it is inadmissible.<sup>5</sup> While the Commission has held that it is not strictly bound by the Rules of Evidence, it has recognized that hearsay should be stricken if it precludes the parties from cross-examining the person who made the statements.<sup>6</sup> In discussing an affidavit filed after the close of a hearing, the Commission granted a motion to strike, stating: “[I]f we were to allow evidence to be admitted in such a manner, any document in question would not be supported by

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<sup>3</sup> In her testimony, Ms. Hawkins states that the rating agency reports are attached as Exhibit RVH-5. *See* Hawkins Testimony, p. 10. The reports are labeled at the back of her testimony, however, as Exhibit RVH-6. For ease of reference, the exhibit will be described as Exhibit RVH-6.

<sup>4</sup> Ohio R. Evid. 801(C).

<sup>5</sup> *See, e.g., Mastran v. Urichich*, 37 Ohio St. 3d 44, 47 (1988); *Hong Kong Trading Ctr. v. Ohio Liquor Control Comm.*, Franklin App. No. 09AP-293, 2010-Ohio-913, ¶ 38 (“Unless a valid exception applies, hearsay is inadmissible”); *Barry v. Barry*, 169 Ohio App. 3d 129, 146 (Cuyahoga App. 2006) (trial court properly sustained objections to hearsay testimony offered at trial).

<sup>6</sup> *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order (Nov. 21, 2006), at p. 2.

testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document.”<sup>7</sup>

The same prejudice arises for the rating agency reports that Ms. Hawkins attempts to put in the record. Rather than limit her testimony to the fact that some rating agencies made changes to AEP Ohio’s ratings, Ms. Hawkins goes further to try to offer the accompanying reports for the truth of the matters asserted therein -- the rating agencies’ beliefs and statements regarding the context for any such changes in ratings, which she apparently believes somehow support AEP Ohio’s Modified ESP. However, AEP Ohio has not offered any of the authors of the rating agency reports as a witness. Therefore, Intervenors cannot cross-examine the authors as to the basis for their beliefs and statements. Intervenors also cannot challenge the credibility of the authors and will not have the opportunity to reveal any limitations in their knowledge or understanding of the regulatory system in Ohio. Allowing AEP Ohio to enter such hearsay into the record would significantly prejudice Intervenors and present an unbalanced record for the Commission’s consideration.

Further, the commentary of the ratings agencies is irrelevant. Evidence Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>8</sup> Evidence that is not relevant is not admissible.<sup>9</sup> None of what the reporting agencies discuss is of consequence to the Commission’s determination of whether the Modified ESP is more favorable in the aggregate than the expected results of a market-rate offer

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<sup>7</sup> *Id.*

<sup>8</sup> *See* Ohio Evid. R. 401.

<sup>9</sup> *See* Ohio Evid. R. 402.

("MRO"). Ms. Hawkins' testimony from page 10, line 20, to page 12, line 18 and Exhibit RVH-6 should be stricken.

**2. Ms. Hawkins has no personal knowledge or foundation for her speculative testimony as to the basis for the rating agencies' actions.**

At page 12, lines 25-31, Ms. Hawkins testifies as follows:

Q. Why did the rating agency react so strongly to the revocation of the ESP Order?

A. For utilities, which have much higher leverage than similarly rated industrial companies, regulatory stability is a major component to the credit ratings. Rating agencies consider competitive generation businesses to be more similar to other industrial companies and require lower leverage for similarly rated competitive businesses. In my opinion, the credit rating agencies were comfortable that a three year transition to market based generation rates provided AEP Ohio with adequate time to implement corporate separation and with adequate cash flows over the transition period. From the published reports, the revocation of the order caused the rating agencies to question if Ohio is entering a period of regulatory uncertainty as well as concern about the cash flows of AEP Ohio to support its current bond ratings.<sup>10</sup>

While Ms. Hawkins may have personal knowledge to testify to the fact that certain rating agencies made changes to AEP Ohio's ratings and *what* those changes were, Ms. Hawkins is attempting here to proffer factual testimony for which she has no basis or personal knowledge. She provides no explanation -- and there is none -- as to how she has personal knowledge of *why* or *how* the rating agencies reached their opinions regarding AEP Ohio's ratings. She speculates that the agencies "were comfortable" with certain assumed facts and that other things "caused the rating agencies to question." She has no basis on which to make these conclusions and if she is simply parroting statements from the reports themselves, that would represent the repetition of improper hearsay. Further, stating that "it is my opinion" does not make her testimony

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<sup>10</sup> Emphasis added.

appropriate. Even if she was speaking as a purported expert witness, an expert may not base his opinion on hearsay.<sup>11</sup> Ms. Hawkins has no personal knowledge on which to offer any “opinions” or other speculation as to why the rating agencies made any changes to AEP Ohio’s rating. Ms. Hawkins’ testimony at p. 12, lines 19-21 should be stricken.

### **CONCLUSION**

As set forth herein, the following portions of the testimony of Renee Hawkins should be stricken from the record:

- Page 10, line 20 through Page 12, line 18;
- Exhibits RVH-6; and,
- Page 12, lines 19-31.

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<sup>11</sup> See *Fireman’s Fund Insur. Co. v. BPS Co.*, 23 Ohio App. 3d 56, 64 (Franklin Cty. 1985) (expert’s opinion as to amount of damage erroneously admitted where it was based solely on hearsay).

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Motion to Strike R. Hawkins Testimony* and the *Memorandum in Support* thereof was served this 4th day of May, 2012, via e-mail upon the parties below.

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Summary: Motion to Strike Testimony of AEP Ohio Witness R. Hawkins electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.