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

REPLY TO MEMORANDUM CONTRA MOTION TO STRIKE PORTIONS OF AEP OHIO'S REPLY BRIEF BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BRUCE J. WESTON
CONSUMERS' COUNSEL

Maureen R. Grady, Counsel of Record
Terry L. Etter
Joseph P. Serio
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Phone: 614-466-9567 (Grady)
Phone: 614-466-7964 (Etter)
Phone: 614-466-9565 (Serio)
grady@occ.state.oh.us
etter@occ.state.oh.us
serio@occ.state.oh.us

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MOTION TO STRIKE PORTIONS OF AEP OHIO'S REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On July 13, 2012, the Office of the Ohio Consumers' Counsel ("OCC") filed a motion asking the Public Utilities Commission of Ohio ("PUCO" or "Commission") to strike portions of the reply brief of Ohio Power Company ("AEP Ohio" or "Company") docketed on July 9, 2012 in this proceeding affecting the electric rates of more than a million consumers. In particular, OCC moved to strike the following passages from AEP Ohio's reply brief because they are based on information not contained in the record of this proceeding and therefore are improper for consideration in this case:

- Attachment A to AEP Ohio's reply brief, which is a July 2, 2012 statement by an analyst at Standard & Poor's Research ("S&P") reacting to the Commission's Capacity Charge Order, and Attachment B to AEP Ohio's reply

brief, which is the Company's recalculation of the comparison between its Modified Electric Security Plan ("ESP") and a market rate offer ("MRO") as a result of the Capacity Charge Order. OCC moved to strike the documents because they are not in the record, are hearsay and are inappropriate for attachment to a reply brief.[1]

- The entire full paragraph on page 29, beginning with "At this point, given that…" through "Tr. XVII at 4879.)", and the entire first paragraph on page 30, beginning with "This shows that the RSR…" through "RPM pricing and $188.88/MW-day.", including the accompanying footnotes and the correction docketed by the Company on July 10, 2012. This material involved the Company's recalculation of its projected return on equity ("ROE") based on the Commission's Opinion and Order in Case No. 10-2929-EL-UNC ("Capacity Charge Case")[2] and how it relates to the Retail Stability Rider ("RSR") in this case. OCC moved to strike the information because the Company's new calculations and arguments cannot be subjected to cross-examination or rebuttal by opposing parties and thus are impermissible for inclusion in a post-hearing reply brief.[3]

[1] OCC Motion, Memorandum in Support at 2-6.

[2] Capacity Charge Case, Opinion and Order (July 2, 2012) ("Capacity Charge Order").

[3] OCC Motion, Memorandum in Support at 6-7.

- From the bottom of page 33, the sentence beginning "In response to the Commission's 10-2929 decision…", through the top of page 34, the passage "(Attachment A.) Unfortunately,". This portion of AEP Ohio's reply brief quotes Attachment A for the truth of the matter asserted and thus is outside the record and impermissible hearsay.[4]
- From the bottom of page 68, the sentence beginning "The recent outages faced…", through the top of page 69, the sentence ending "customers' impressions of the system." Here, the Company made assertions regarding outages caused by recent storms as they relate to customers' reliability expectations and argued that the outages should not be considered in the Commission's assessment of the Company's service performance. OCC moved to strike that information regarding the storms because it is not part of the record in this proceeding, and thus the Company's use of the information to support its arguments is improper.[5]
- All of Section III.A.3, beginning on page 97 and ending on page 99, including the accompanying footnote. Here, the Company used its recalculated ESP-MRO comparison from

[4] See id. at 2-6.

[5] Id. at 8-9.

> Attachment B to assert that the ESP is quantitatively more favorable than the MRO. OCC argued that because this portion of the Company's reply brief is based on an improper attachment, it should also be stricken.[6]

On July 18, 2012, the Company filed a memorandum contra OCC's Motion. As discussed herein, the Company's arguments are unavailing. The Commission should grant OCC's Motion and strike the above-identified portions of AEP Ohio's reply brief.

II. ARGUMENT

A. The Company's Argument Against Striking its Recalculation of the ESP-MRO Comparison Attempts to Confuse the Issues in the Motion.

In defending its Attachment B (the recalculation of the ESP-MRO comparison), the Company attempts to use sleight of hand to obfuscate the issues raised in OCC's Motion. After explaining its view of the record of this proceeding, the Company states the following: "While OCC would rather not have the Commission consider the impact of its *Capacity Decision*, it does not refute or question the accuracy of the 5.9% ROE projection based on the record."[7] The Company, however, mischaracterizes the reason for OCC's Motion.

The purpose of OCC's Motion was not to refute the accuracy of the Company's calculations in AEP Ohio's reply brief.[8] Instead, OCC's Motion appropriately pointed out that the calculations were included in an impermissible attachment to the Company's

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[6] Id. at 6.

[7] Memorandum Contra at 5.

[8] In fact, if OCC had used the Motion to refute the accuracy of the calculations, the Company would likely have argued that such a use of a motion was itself improper.

reply brief because the information is not in the record.[9] As such, the Company's new calculations and arguments concerning them cannot be subjected to cross-examination or rebuttal by opposing parties, and thus should be stricken. Indeed, OCC is not in a position to refute or accept the accuracy of the 5.9% ROE projection because that calculation has not been tested through discovery or cross-examination. This is the very reason that allowing information in on reply brief, without subjecting it to thorough examination, is wrong.

The Company also claims that OCC's Motion is disingenuous because OCC/APJN[10] and other parties argued in their reply briefs that the RSR was no longer applicable or relevant in light of the Capacity Charge Order.[11] The Company asserts that "OCC merely wants one side of the argument (*i.e.*, OCC's perspective) to be presented without the Commission considering the other side (*i.e.*, the Company's perspective)."[12] The Commission should not be persuaded by the Company's argument.

If the Company's position were true, then OCC would have asked the Commission to strike more than just the five portions of the Company's 122-page brief. Instead, OCC's Motion narrowly focused on the two improper attachments and less than four pages of text. The Motion hardly attempts to block the Commission from considering the Company's perspective. The point is that perspectives of the parties should be considered, but in a structured fashion subject to due process requirements. Information should be *properly* placed in the record, and parties should be given the full

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[9] OCC Motion at 6.

[10] OCC and the Appalachian Peoples Justice Network ("APJN") jointly filed a Reply Brief on July 9, 2012.

[11] Memorandum Contra at 7-8, citing OCC/APJN Reply Brief at 16-28; Ormet Reply Brief at 6-7; OEG Reply Brief at 7-8; OMAEG Reply Brief at 12-13; Kroger Reply Brief at 2.

[12] Id. at 8.

opportunity to confront the information so the Commission may make its decisions based on multiple perspectives concerning the information. The Companies' introduction of such information in its reply brief deprives parties of the ability to confront the information in a structured manner, and deprives parties of due process.

Further, the Commission should take note that, unlike with the Company's brief, discussion of the Capacity Charge Order in OCC/APJN's reply brief was limited to the four corners of the Commission's Order. OCC/APJN did not try to inappropriately insert into the record non-parties' comments on the Capacity Charge Order that were not part of the record in this proceeding or the Capacity Charge Case. Instead, the OCC/APJN reply brief appropriately examined the record in the Capacity Charge Case and how it relates to this proceeding. The Commission should not be fooled by the Company's feeble attempt to shift the Commission's attention away from the true issue: the Company's impermissible use of hearsay in its reply brief.

The Company also asserts that "OCC may be using the motion to strike as a procedural vehicle for presenting additional arguments outside of the briefing and oral argument process established in this proceeding."[13] This fabrication is another example of the Company's desire to divert the Commission's attention away from the real issues in the Motion. The Company has absolutely no basis for making this claim. OCC's Motion does not present any additional arguments regarding the merits of this case. Rather, OCC's Motion is clearly focused on the issues surrounding AEP Ohio's improper

[13] Id.

use of non-record information in its reply brief.[14] The Company's statement does nothing more than show that its attempt to rely on extra-record material in its reply brief is defenseless.

On the other hand, the Company uses its memorandum contra as a means to rebut an issue discussed in the OCC/APJN brief. In its memorandum contra, the Company contends that "OCC's argument that there are matters in reply briefs that go beyond the record and are improper is better applied to its own reply brief."[15] The Company cites to the discussion on pages 35-36 of the OCC/APJN Reply Brief regarding reliability standards at issue in Case No. 12-1945-EL-ESS. But rather than alleging that the discussion was based on impermissible hearsay – the point of OCC's Motion regarding the Company's brief – the Company attempts to rebut the characterization of the 12-1945-EL-ESS case in the OCC/APJN reply brief.[16] This rebuttal itself is objectionable and should be stricken as it is an impermissible reply to a reply brief, something that is not allowed under the Commission's rules.

Nevertheless, the Company asserts that "[a]rguments based on initial filings of one party in an entirely different and unrelated proceeding show the inappropriate use of items in a post-hearing brief."[17] This, however, is nothing but another attempt by the

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[14] The only hint of "additional arguments" found in OCC's Motion is the discussion of issues related to the Company's claims regarding power outages resulting from the recent storms. Motion at 8-9. This, however, was in response to the Company's argument, raised for the first time in its reply brief, that "[t]he recent outages should be considered a Major Storm Event and not be considered in the reliability standards set by the Commission…." AEP Ohio Reply Brief at 68. This argument in the Company's reply brief is irrelevant to the issues in this proceeding and, as OCC pointed out (Motion at 8-9) relies on extra-record materials.

[15] Id. at 3.

[16] Id. at 3-4.

[17] Id. at 4.

Company to divert the Commission's attention from the sound arguments in OCC's Motion. AEP Ohio's attempts at misdirection should be rejected.

In fact, the discussion of the 12-1945-EL-ESS case was properly included in the OCC/APJN Reply Brief. Footnote 114 on page 35 of the brief requested that the Commission take administrative notice of the Company's filing in the 12-1945-EL-ESS case under Ohio Rules of Evidence Rule 201(F), which states: "Judicial notice may be taken at any stage of the proceeding." Thus, OCC and APJN properly sought administrative notice of the documents found in the record from the 12-1945-EL-ESS case referenced in the OCC/APJN Reply Brief. In comparison, the information identified in the Motion is not found in the record of any PUCO proceeding.

The Commission should not be fooled by the Company's attempts to obfuscate the issues in OCC's Motion. OCC's Motion presented legitimate reasons, based on Commission precedent, for the Commission to strike the material identified in the Motion. The Commission should grant OCC's Motion.

B. The Company's Arguments Against Striking the S&P Statement Fail.

The Company claims that the S&P statement "was not presented for the truth of the matter asserted but only to put the Commission on notice as to the analyst's perceptions."[18] First, the Company's claim – that its use of non-record information is to put the Commission "on notice" – is pure nonsense that has no legal meaning. R.C. 4903.09 requires a record.

[18] Memorandum Contra at 12.

Second, the Company uses the S&P statement not to merely notify the Commission of an "analyst's perceptions," but to lend support for the argument that "the adverse financial impacts of not adopting the RSR are significant."[19] The Company attempts to use the statement from a third party for the truth of the matter asserted, which is the pure definition of hearsay. The presentation of this statement in the Company's reply brief, however, does not fit into an exception for hearsay.[20] And unlike the investor report mentioned in the memorandum contra,[21] the S&P statement was not relied on for testimony by an expert witness. Thus, there is absolutely no basis to allow it into the record. Indeed, it is not in the record and cannot be relied upon by the Commission.

The Company's attempt to distinguish this case from those regarding the impropriety of attachments to reply briefs, cited in the Motion,[22] also fails. AEP Ohio claims that those cases do not apply to the Company's reply brief in this proceeding:

> The *FAF* case was a commercial motor vehicle civil forfeiture proceeding in which a trucking company did not provide the driver who was present at the roadside inspection at the hearing, but instead tried to attach an affidavit from the driver after the hearing closed asserting a number of factual matters that the Commission Staff never had an opportunity to challenge in the course of the hearing. Likewise, in the *Juanita v. Columbia Gas* case, the complainant attempted to attach a fire department report from a period unrelated to the complaint that had been denied admission during the evidentiary hearing. Nor does the case cited involving Columbus Southern Power Company have any application in this proceeding. In that case, the city of Reynoldsburg attempted to

[19] AEP Ohio Reply Brief at 33.

[20] Ohio Evidence Rules 803 and 804.

[21] Memorandum Contra at 12.

[22] *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Company* Case No. 08-846-EL-CSS; *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF; *In the Matter of the Complaint of Wendell and Juanita Thompson v. Columbia Gas of Ohio, Inc.*, Case No. 04-22-GA-CSS.

> attach a "newspaper article" about another municipality that did not relate to the issues involved in the proceeding.[23]

The Company, however, is wrong.

The cases cited above show the impropriety of reply brief attachments that are not a part of the record to the proceeding. The affidavit in the *FAF* case was relevant to the proceeding, but it was impermissible as an attachment to the reply brief because it was not subject to cross-examination. The S&P statement attached to the Company's reply brief has the same flaw. Further, the relevance of attachments – which was a problem with the attachments in the *Columbia Gas* and *City of Reynoldsburg* cases – should have no bearing on the issue of hearsay. Indeed, one could argue that attachments that are relevant to the matter at hand should face a higher level of scrutiny, because they are more likely to have a bearing on the decision in the case.

Interestingly, the Company concludes its argument against striking the S&P statement by stating, "It bears pointing out that a newspaper article was also not allowed to be entered into this proceeding during the evidentiary hearing as admissible evidence."[24] The newspaper article was stricken on an argument that the article was hearsay, because the author of the article was not present for questioning at the hearing and the study he relied upon was also not at the hearing.[25] Similarly, the author of the S&P statement is not available for cross-examination, and thus the statement should be stricken as hearsay.

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[23] Memorandum Contra at 12.

[24] Id., citing Tr. Vol. XIV at 3867.

[25] Tr. Vol. XIV at 3854, 3866.

The Company also relies on the Commission's Opinion and Order in the *FirstEnergy/Duquesne* case[26] to support its assertion that the Commission "previously declined to strike post-hearing information provided with a brief because it was consistent with testimony and evidence provided during the hearing."[27] The Company contends that a letter filed by FirstEnergy after the hearing concluded in that case was allowed because it "merely pointed out items that FE had asserted during the hearing that needed to take place in the future."[28] The Company's claim, however, is wrong, and the facts in this case are different from those in *FirstEnergy/Duquesne*.

The letter filed by FirstEnergy after the briefing schedule had concluded did not rely on the opinion of a non-party to the proceeding to further an argument. Instead, the letter set forth FirstEnergy's view of post-hearing events involving a transaction pertinent to the proceeding:

> In addition to indicating that Orion was chosen as the winning bidder of Duquesne's generation asset auction, FirstEnergy states that several aspects of the transaction have now been finalized. Among other things, the letter indicates that: the Must Run and Connection agreements have been finalized by the new owner, in substantially the form of the agreements originally executed by FirstEnergy and Duquesne; Duquesne has agreed to pay FirstEnergy approximately $10 million for the cost of construction of transmission reinforcement facilities, in order to eliminate the need for the existence of the Must Run Agreement; the closing date between FirstEnergy and Duquesne will be December 2, 1999 – however, Duquesne's closing with Orion is expected to occur a few months later and, during the interim period, Avon Lake, New Castle, and Niles will continue to be operated by FirstEnergy on Duquesne's behalf. The letter states that FirstEnergy has already

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[26] *In the Matter of the Commission's Review of the Generation Exchange Between the FirstEnergy Operating Companies (Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company) and Duquesne Light Company*, Case No. 98-1636-EL-UNC, Opinion and Order (October 28, 1999) ("98-1636 Order").

[27] Memorandum Contra at 11.

[28] Id.

> begun to take steps to plan and construct the transmission reinforcement facilities, which are expected to be operational in approximately 18 to 24 months. FirstEnergy asserts that, because Duquesne is contributing up to $10 million for the construction of these facilities, none of the burden of paying for the facilities will be borne by ratepayers through either FERC or PUCO set rates.[29]

Thus, the letter merely recited FirstEnergy's view of events associated with the case that occurred after the hearing concluded. Intervenors to the case were able to present their view of the events in a docketed letter responding to FirstEnergy's claims.[30]

In this proceeding, however, the S&P statement is not a recitation of the Company's perceived **facts** that occurred after the hearing; it is instead the **opinion** of an S&P analyst. The ability to respond to the opinion inserted in the Company's reply brief is not available to intervenors. Intervenors have no opportunity to cross-examine or depose the S&P analyst responsible for the statement in order to determine the basis for the statement and provide the Commission with a thoughtful response. This is unfair to intervenors. The Commission should grant OCC's Motion and strike Attachment A as well as the discussion of it in AEP Ohio's reply brief.

C. The Company Also Fails to Support its Discussion of the Power Outages Caused by the June Storm.

The Company asserts that OCC appears to not understand the point of the discussion regarding the June storm in the Company's reply brief.[31] The Company states that the storm damage portion of the brief "was used as an example of how customer expectations are impacted when a major storm event occurs."[32]

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[29] 98-1636 Order at 4.

[30] Id.

[31] Memorandum Contra at 13.

[32] Id.

In its reply brief, however, the Company also asserted that "[t]he recent outages faced by much of the Midwest and East Coast are a good example of the importance of reliable electric service and increased expectations by customers."[33] There is nothing in the record to demonstrate the impact of the recent storms on customer expectations concerning service, or that "customer expectations are aligned with the Company's in need of the DIR" as AEP Ohio claims.[34]

The main purpose of the discussion regarding the June storm appears to be the Company's self-serving statement that "[t]he recent outages should be considered a Major Storm Event and not be considered in the reliability standards set by the Commission…."[35] Not only is this irrelevant to this proceeding, but it also is not supported by the record. The Commission should grant OCC's Motion and strike the Company's discussion of the June storms in its reply brief.

III. CONCLUSION

OCC's Motion presents reasoned, well-supported arguments for striking the identified portions of the Company's reply brief. The Company's arguments against OCC's Motion, however, are unavailing and unsupported. The Commission should grant OCC's Motion and should strike the identified portions of the Company's reply brief.

[33] Reply Brief at 68.

[34] Memorandum Contra at 13.

[35] Reply Brief at 68.

Respectfully submitted,

BRUCE J. WESTON
CONSUMERS' COUNSEL

/s/ Terry L. Etter
Maureen R. Grady, Counsel of Record
Terry L. Etter
Joseph P. Serio
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Phone: 614-466-9567 (Grady)
Phone: 614-466-7964 (Etter)
Phone: 614-466-9565 (Serio)
grady@occ.state.oh.us
etter@occ.state.oh.us
serio@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served by electronic mail to the persons listed below on this 23rd day of July 2012.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

SERVICE LIST

Werner.margard@puc.state.oh.us
John.jones@puc.state.oh.us
lmcalister@bricker.com
tsiwo@bricker.com
MWarnock@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
tobrien@bricker.com
fdarr@mwncmh.com
joliker@mwncmh.com
ghummel@mwncmh.com
ricks@ohanet.org
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org
Philip.sineneng@thompsonhine.com
Dorothy.corbett@duke-energy.com
Elizabeth.watts@duke-energy.com
myurick@taftlaw.com
dconway@porterwright.com
cmoore@porterwright.com
haydenm@firstenergycorp.com
mkurtz@BKLlawfirm.com
dboehm@BKLlawfirm.com
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
dan.barnowski@snrdenton.com
JLang@Calfee.com
lmcbride@calfee.com
talexander@calfee.com
ssolberg@eimerstahl.com
aaragona@eimerstahl.com
jejadwin@aep.com
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
wmassey@cov.com
henryeckhart@aol.com
jesse.rodriguez@exeloncorp.com
sandy.grace@exeloncorp.com
kpkreider@kmklaw.com
dmeyer@kmklaw.com
holly@raysmithlaw.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
gthomas@gtpowergroup.com
laurac@chappelleconsulting.net
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Asim.Haque@icemiller.com
sjsmith@szd.com
tsantarelli@elpc.org
nolan@theoec.org
trent@theoec.org
cathy@theoec.org
ned.ford@fuse.net
gpoulos@enernoc.com
sfisk@nrdc.org
zkravitz@taftlaw.com
aehaedt@jonesday.com
dakutik@jonesday.com
callwein@wamenergylaw.com
Terrance.Mebane@ThompsonHine.com

dstahl@eimerstahl.com
whitt@whitt-sturtevant.com
thompson@whitt-sturtevant.com
mswhite@igsenergy.com
kaelber@buckleyking.com
walter@buckleyking.com
judi.sobecki@dplinc.com
randall.griffin@dplinc.com
Stephanie.Chmiel@ThompsonHine.com
rjhart@hahnlaw.com
rremington@hahnlaw.com
djmichalski@hahnlaw.com
jhummer@uaoh.net
tlindsey@uaoh.net
ssalamido@cloppertlaw.com
arthur.beeman@snrdenton.com
yalami@aep.com
greta.see@puc.state.oh.us
Jonathan.tauber@puc.state.oh.us
bpbarger@bcslawyers.com
cendsley@ofbf.org
dane.stinson@baileycavalieri.com
jmclark@vectren.com
sbruce@oada.com
rsugarman@keglerbrown.com
matt@matthewcoxlaw.com
mchristensen@columbuslaw.org
toddm@wamenergylaw.com
rburke@cpv.com
bkelly@cpv.com
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com
kwatson@cloppertlaw.com
Thomas.millar@snrdenton.com
James.rubin@snrdenton.com

Case No(s). 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

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