

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Federal Insurance Company,	)	
as subrogee of Genesis Healthcare System,	)	
	)	
Complainant,	)	Case No. 12-1750-EL-CSS
	)	
v.	)	
	)	
American Electric Power Company, Inc.,	)	
	)	
Respondent.	)	

**MEMORANDUM CONTRA OF RESPONDENT OHIO POWER COMPANY  
TO COMPLAINANT’S MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL REBUTTAL TESTIMONY**

Ohio Power Company d/b/a AEP Ohio, pursuant to Rule 4901-1-12 of the Ohio Administrative Code (“O.A.C.”), files this memorandum contra Complainant’s Motion for Leave to File Supplemental Rebuttal Testimony of Complainant’s Expert Witness Jeff R. Paulus, P.E. (“Motion for Leave”) that Complainant Federal Insurance Company (“Federal”) filed on October 9, 2013. Federal’s Motion for Leave seeks permission to file Mr. Paulus’s discovery deposition transcript as “supplemental rebuttal” testimony. That request, however, violates O.A.C. 4901-1-21(N), Civ. R. 32(A), and the Attorney Examiner’s May 17, 2013 Entry. If granted, it would also prejudice AEP Ohio. Accordingly, AEP Ohio respectfully requests that the Attorney Examiner deny Federal’s Motion for Leave and strike Mr. Paulus’s “supplemental rebuttal” testimony from the record.

**I. Federal’s Motion For Leave Should Be Denied Because It Violates O.A.C. 4901-1-21(N) And Civ. R. 32(A).**

The Attorney Examiner should deny Federal’s motion for leave because Federal’s proposed submission of Mr. Paulus’s discovery deposition transcript violates both O.A.C. 4901-1-21(N) and Civ. R. 32(A), upon which the Commission’s Rule relies. Rule 4901-1-21(N)

provides that “[d]epositions may be used in commission hearings to the same extent permitted in civil actions in courts of record.” As the Commission has recognized, “Civil Rule 32(A) sets forth the circumstances under which depositions may be used. The burden of showing the existence of one of the enumerated circumstances is on the party seeking to use a deposition.”

*S.G. Foods, Inc., et al. v. The Cleveland Electric Illuminating Company, et al.*, Case Nos. 04-28-EL-CSS, Entry at 3 (Nov. 2, 2007). Civ. R. 32(A) in turn lists the following limited circumstance under which a party may use a deposition:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

- (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
- (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.
- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is beyond the subpoena power of the court in which the action is pending or resides outside of the county in which the action is pending unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard; or (f) that the oral examination of a witness is not required; or (g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Civ. R. 32(A).

None of the above circumstances are applicable to Federal's Motion for Leave. Subpart (1) is inapplicable because the deponent, Mr. Paulus, is Federal's own witness, and Federal is plainly not offering the testimony for the purpose of contradicting or impeaching him. Subpart (2) is also inapplicable, as Mr. Paulus is neither a party nor a designee under Civ. R. 30(B)(5) or 31. Likewise, subpart (3) is inapplicable because Mr. Paulus is not unavailable. Indeed, Federal plans for Mr. Paulus to attend and testify at the upcoming evidentiary hearing on October 24, 2013. Accordingly, because the Commission's rules and Ohio Rules of Civil Procedure do not permit Federal to use Mr. Paulus's deposition in the manner that Federal seeks, Federal's Motion for Leave should be denied.

**II. Federal's Motion For Leave Should Be Denied Because It Violates The Attorney Examiner's May 17, 2013 Scheduling Entry In This Case.**

In addition to being an inappropriate use of Mr. Paulus's discovery deposition transcript, Federal's request to file additional "testimony" violates the Attorney Examiner's May 17, 2013 scheduling Entry in this case. In that Entry, the Attorney Examiner ordered that "[a]ny additional testimony beyond the above-listed schedule may only be presented during the evidentiary hearing by affirmative permission, after the hearing begins, from the attorney examiner for good cause shown." Entry at 2 (May 17, 2013). Thus, if Federal wishes to present additional testimony from Mr. Paulus, Federal must request permission to do so at the hearing of this case and must demonstrate that there is good cause for the new testimony. For this reason too, the Attorney Examiner should deny Federal's Motion for Leave and require Federal to comply with the May 17, 2013 Entry.

### **III. Granting Federal's Motion For Leave Will Prejudice AEP Ohio.**

The Attorney Examiner also should deny Federal's Motion for Leave because granting it will prejudice AEP Ohio. Counsel for AEP Ohio took a discovery deposition from Mr. Paulus, not a trial deposition. Counsel questioned Mr. Paulus with the expectation of cross-examining Mr. Paulus at hearing. Counsel thus did not ask Mr. Paulus cross-examination questions and other questions that will be asked at the hearing to test Mr. Paulus's testimony and demonstrate its flaws and irrelevance. The deposition transcript therefore presents an incomplete and inaccurate record, and its admission as "supplemental rebuttal" testimony (along with Federal's inappropriate Motion, which inaccurately characterizes the testimony and asserts legal arguments regarding its meaning) could improperly limit AEP Ohio's defense of Federal's claims. Accordingly, because AEP Ohio would be denied its right to fully and effectively cross-examine Mr. Paulus if the deposition transcript is permitted as evidence Federal's Motion for Leave should be denied.

### **CONCLUSION**

Throughout this proceeding, Federal has filed whatever it pleases, whenever it pleases, in disregard of the Commission's rules and Attorney Examiner's scheduling Entries.<sup>1</sup> In the spirit of cooperation and so as not to unnecessarily slow this proceeding or burden the Attorney Examiner, AEP Ohio has thus far not objected to any of those inappropriate filings. Federal's Motion for Leave, however, goes a step too far and must be addressed. Although its proposal may have been conceived as an attempt to save hearing expense, Federal's attempt to limit cross-examination would come with an unacceptable cost of sacrificing AEP Ohio's due process

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<sup>1</sup> The latest example of this is Federal's "Hearing Brief" that was docketed (without a certificate of service or service upon Counsel for Respondent) on October 17, 2013 – a week before the scheduled evidentiary hearing.

rights. Accordingly, for the reasons set forth above, AEP Ohio respectfully requests that the Attorney Examiner deny Federal's Motion for Leave and strike Federal's proposed "supplemental rebuttal" testimony.

Respectfully submitted,

/s/ Christen M. Blend

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by e-mail upon counsel for the  
Complainant on this 21st day of October, 2013.

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/s/ Christen M. Blend  
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COLUMBUS/1694236v.1

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**10/21/2013 2:28:46 PM**

**in**

**Case No(s). 12-1750-EL-CSS**

Summary: Memorandum Contra of Respondent Ohio Power Company to Complainant's Motion for Leave to File Supplemental Rebuttal Testimony electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company