

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into an Affiliate Power)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider)	

In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 14-1694-EL-AAM
Certain Accounting Authority)	

**OHIO POWER COMPANY'S MOTION TO STRIKE TESTIMONY
OF EDWARD W. HILL**

Pursuant to Rules 4901-1-12 and 4901-1-27(B)(7)(a) and (b) of the Ohio Administrative Code, Ohio Power Company ("AEP Ohio" or the "Company") moves to strike certain portions of and attachments to the direct testimony of Edward W. Hill, filed September 11, 2015 on behalf of the Ohio Manufacturers' Association Energy Group ("OMAEG"). As the attached memorandum in support demonstrates, all of the testimony and attachments that AEP Ohio seeks to strike constitute inadmissible hearsay. Accordingly, the Company respectfully requests that the Commission strike the following portions of Mr. Hill's direct testimony:

- Attachment EWH-1
- Page 6, footnote 7
- Attachment EWH-2
- Page 6, lines 11 through 12 and footnote 8
- Page 9, footnote 11
- Page 9, lines 8 through 15 and footnote 12
- Page 10, lines 3 through 6 and footnote 14
- Page 10, lines 11 through 13 and footnote 16
- Page 11, lines 3 through 8 and footnote 17
- Page 11, lines 10 through 13 and footnote 18
- Page 11, lines 15 through 18
- Page 12, lines 1 through 7 and footnote 19
- Attachment EWH-3

- Page 13, footnote 20
- Page 14, lines 10 through 11 and footnote 21
- Page 17, footnote 27
- Page 18, line 18, through page 19, line 1, and footnote 28
- Attachment EWH-4
- Page 20, footnote 29

Respectfully submitted,

/s/ Daniel R. Conway

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

OMAEG witness Edward W. Hill's direct testimony is replete with inadmissible and irrelevant hearsay that Evid.R. 802 and 401 prohibit. The Commission, therefore, should strike the testimony and attachments identified above in their entirety.

II. LAW AND ARGUMENT

It is well established that "the Commission seeks to maintain consistency with the Ohio Rules of Evidence to the extent practicable." *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm.*, 2 Ohio St. 3d 62, 68, 442 N.E.2d 1288 (1982). Those rules define hearsay 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." Evid.R. 801(C). Hearsay is inadmissible "except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by [the Ohio Rules of Civil Procedure], or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802.

This Commission has made clear that where testimony is "inadmissible hearsay, and no exception applies" it should be "stricken from the record." *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Opinion, Order, and Certificate, at 11 (May 28, 2013) (striking hearsay assertion by witness). *See also id.*, Entry on Rehearing, at p. 18 (Sept. 30, 2013) (striking portion of witness testimony that was admittedly a quotation copied from Wikipedia, which is "undeniably hearsay"). A document constitutes inadmissible hearsay if the document's author is "not present at hearing and, therefore, not

subject to cross-examination under oath * * *.” *In the Matter of the Complaint of Leisa Dickerson v. The Cleveland Electric Illuminating Company*, Case No. 04-995-EL-CSS, Opinion and Order, at 2, n.1 (Feb. 1, 2006).

Such is the case here. Attachments EWH-1 through EWH-4 to OMAEG witness Hill’s testimony are textbook examples of hearsay that cannot be saved by any exception in the evidence rules. The portions of Mr. Hill’s testimony discussing and describing those inadmissible hearsay attachments are likewise inadmissible, as are the portions of Mr. Hill’s testimony citing and discussing magazine and newspaper articles.

A. Attachment EWH-1 and Related Testimony

Attachment EWH-1 is an advocacy piece prepared by the Institute for Energy Economics and Financial Analysis regarding the FirstEnergy family of companies. Mr. Hill did not author Attachment EWH-1. (*See* Hill Test. at Att. EWH-1, p. 1, 51.) Yet he has offered it as proof for his statement that AEP Ohio’s PPA proposal, “if implemented, would fundamentally distort the electricity wholesale energy markets.” (Hill Test. at 6.) The document thus clearly constitutes hearsay.

Moreover, Attachment EWH-1 cannot be saved by any exception to the hearsay rule. OMAEG will likely argue that the document constitutes either a learned treatise or a business record, as it did in FirstEnergy’s pending ESP proceeding.¹ Neither exception applies here. Attachment EWH-1 does not qualify as a learned treatise because it cannot be “established as a

¹ *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Testimony Vol. XXVI. Notably, the attorney examiners presiding over the hearing in FirstEnergy’s ESP case sustained motions to strike Attachments EWH-1 and EWH-2 and the testimony related thereto that AEP Ohio seeks to strike here. *See id.* at Testimony Vol. XXVI and XXVII. Mr. Hill did not offer Attachments EWH-3 or EWH-4 in FirstEnergy’s case.

reliable authority.” *See* Evid.R. 803(18). An advocacy piece cannot be a learned treatise because there is “a probability of bias [that] exists [and] which undermines the logic supporting the admission of [the] material in evidence as an exception to the rule against hearsay.” *O’Brien v. Angley*, 63 Ohio St. 2d 159, 164, 406 N.E.2d 1355 (1980). Nor does the document constitute a business record under Evid.R. 803(6). In order to qualify under that exception, Mr. Hill must be able to testify from personal knowledge regarding the method by which the document was prepared and the facts recorded, that the facts were recorded at a time soon after they occurred, and that the document was prepared and kept in the regular course of the Institute for Energy Economics and Financial Analysis’s business. Evid.R. 803(6). A third person, like Mr. Hill, “who has merely reviewed the records is not qualified to testify as to the foundational requirements of Evid.R. 803(6).” *Grant v. Forgash*, 10th Dist. Franklin No. 95APE06-792, 1995 Ohio App. LEXIS 5900, *13 (Dec. 26, 1995).

Additionally, Attachment EWH-1 lacks any indicia of reliability worthy of disregarding its hearsay status. It expressly cautions readers that it has been prepared “for information and educational purposes only” and “is intended solely as a discussion piece * * *.” (Hill Test. at Att. EWH-1, p. 49.) And it expressly states that its preparer “does not guarantee its accuracy, timeliness or completeness * * *.” (*Id.*) Finally, Attachment EWH-1, which discusses FirstEnergy, is irrelevant to these proceedings concerning AEP Ohio.

For these reasons, the Commission should strike Attachment EWH-1 as hearsay and irrelevant. The Commission also should strike footnote 7 on page 6 of Mr. Hill’s testimony, and footnote 28 on page 18, on the same basis.

B. Attachment EWH-2 and Related Testimony

Attachment EWH-2 is another advocacy piece, this time prepared for the Ohio Manufacturers' Association. Mr. Hill also did not author Attachment EWH-2 (*see* Hill Test. at Att. EWH-2, p. 1), but he has offered it and its contents throughout his testimony for the proof of the statements contained in the attachment. (*See* Hill Test. at 6-12.) For the reasons set forth above with respect to Attachment EWH-1, Attachment EWH-2 also is hearsay that is not saved by any exception. The Commission, therefore, should strike it. The Commission should strike the following testimony, which describes and discusses the content of Attachment EWH-2, on the same basis:

- Page 6, lines 11 through 12 and footnote 8
- Page 9, lines 8 through 15 and footnote 12
- Page 10, lines 3 through 6 and footnote 14
- Page 10, lines 11 through 13 and footnote 16
- Page 11, lines 3 through 8 and footnote 17
- Page 11, lines 10 through 13 and footnote 18
- Page 11, lines 15 through 18
- Page 12, lines 1 through 7 and footnote 19

C. Attachment EWH-3 and Related Testimony

Attachment EWH-3 is yet another advocacy piece written for the COMPETE Coalition. Like the others, Mr. Hill did not author Attachment EWH-3 (*see* Hill Test. at Att. EWH-3, p. 1), but he has offered it a proof of his assertions that “a competitive electric market has helped to reduce industrial costs of electricity” and that “market restructuring is working.” (Hill Test. at 12-14.) Like Attachments EWH-1 and EWH-2, Attachment EWH-3 constitutes inadmissible hearsay not saved by any exception, and the Commission should strike it. The Commission likewise should strike the following testimony, which described and discusses the content of Attachment EWH-3, on the same basis:

- Page 13, footnote 20

- Page 14, lines 10 through 11 and footnote 21

D. Attachment EWH-4 and Related Testimony

For the same reasons as those set forth above, the Commission should strike Attachment EWH-4, which contains legislative testimony that Andrew Ott, Executive Vice President, Markets for PJM gave to the Ohio Energy Mandates Study Committee earlier this year. (Hill Test. at Att. EWH-4.) Mr. Hill offers Mr. Ott's testimony as proof that "there is ample generation in the PJM region to meet Ohio's generation requirements for the foreseeable future." (Hill Test. at 20.) Mr. Ott's testimony, however, clearly constitutes "a statement other than one made by the declarant while testifying at [this] * * * hearing." Evid.R. 801(C). Accordingly, it should be stricken as hearsay, along with the portion of footnote 29 on page 20 of Mr. Hill's direct testimony that cites it. The Commission also should strike the portion of footnote 28 on page 18 of Mr. Hill's testimony, citing legislative testimony given by Janine Migden-Ostrander in 2007, on this basis.

Additionally, both Mr. Ott's and Ms. Migden-Ostrander's legislative testimony should be stricken because they cannot be properly authenticated. The Commission follows Evid.R. 901(A)'s requirement that a document is not admissible unless it is authenticated properly. *See, e.g., Westside Cellular, Inc. v. New Par Companies*, Case No. 93-1758-RC-CSS, Entry on Rehearing, at 15 (Apr. 25, 2001) (denying application for rehearing of attorney examiner's decision to exclude evidence because such evidence was not properly authenticated, among other reasons); *In Re Petition of Ben Donahue & Numerous Other Subscribers of the N. Jackson Exch. of Ameritech Ohio, Complainants*, Case No. 97-718-TP-PEX, Entry, 1997 Ohio PUC LEXIS 837, *2-3 (Nov. 4, 1997) (finding that certain evidence could be presented at hearing as long as

the “evidence is authenticated properly.”). Attachment EWH-4 and footnotes 28 and 29 of Mr. Hill’s direct testimony should be stricken for this reason as well.²

E. Magazine and Newspaper Articles

Finally, Mr. Hill’s direct testimony cites an April/May 2009 article from Area Development Magazine and a 2009 article published in The Plain Dealer. (Hill Test. at 9, n.11, and 17, n.27.) The Commission has repeatedly held that such articles are “nothing more than hearsay and shall not be considered” in Commission proceedings. *In the Matter of the Application of Duke Energy Retail Sales, LLC, for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, Entry, at 6 (Dec. 3, 2008); *see also In the Matter of the Long-Term Forecast Reports of Ohio Power Company and Columbus Southern Power Company*, Case Nos. 10-501-EL-FOR, *et al.*, Opinion and Order, at 9 (Jan. 9, 2013) (affirming attorney examiner ruling excluding newspaper articles as hearsay); *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Company*, Case No. 08-846-EL-CSS, Opinion and Order at 28 (Apr. 5, 2011) (striking newspaper article attached to post-hearing brief as hearsay). So have civil courts. *See, e.g., State ex rel. Boccuzzi v. Cuyahoga Cty. Comm’rs*, 8th Dist. Cuyahoga No. 86333, 2006-Ohio-1835, ¶ 9 (giving “no weight” to proffered magazine article because “[a] newspaper article cannot be accepted as evidence, it is ‘hearsay’ of the remotest character”); *Gorcheff v. Rambo*, 7th Dist. Mahoning No. 83 C.A. 6, 1985 Ohio App. LEXIS 6335, *17 (Apr. 11, 1985) (finding that a magazine article “was obviously hearsay and should not have been admitted into evidence”). Accordingly, the

² AEP Ohio also notes that the legislative testimony that is the subject of this motion is distinguishable from the testimony that is the subject of FirstEnergy’s pending interlocutory appeal in Case No. 14-1297, which involved testimony from a company official being offered against the company. Neither of the pieces of legislative testimony at issue here were given by an AEP Ohio official.

Commission should strike the portion of footnote 11 on page 9 of Mr. Hill's direct testimony that cites the Area Development Magazine article. Likewise, it should strike footnote 27 on page 17 of Mr. Hill's testimony in its entirety.

III. CONCLUSION

For the reasons set forth above, AEP Ohio respectfully requests that the Commission strike the portions of and attachments to OMAEG witness Hill's testimony discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *Ohio Power Company's Motion to Strike Testimony of Edward W. Hill* was served by e-mail upon the following counsel of record for all parties on this 15th day of October, 2015:

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Summary: Motion Ohio Power Company's Motion to Strike Testimony of Edward W. Hill electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company and Mr. Daniel R. Conway