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.	)	

COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM CONTRA MOTION TO STRIKE TESTIMONY FILED BY FIRSTENERGY SOLUTIONS CORP.

Columbus Southern Power Company and Ohio Power Company (collectively, "AEP Ohio" or the "Companies"), pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-12, file this memorandum contra the motion to strike testimony filed by FirstEnergy Solutions Corp. ("FES"). Contrary to FES's assertions otherwise, a strict application of Ohio Rule of Evidence 702 is inappropriate in this case, given both the nature of PUCO proceedings and the fact that the topics sought to be stricken have already been presented to the Commission in two prior proceedings. Even if a strict application of Rule 702 were appropriate, which it is not, FES's motion nonetheless should be denied because the proffered witnesses and testimony fully satisfy both sections (B) and (C) of the Rule. AEP-Ohio witnesses Dr. LaCasse and Ms. Thomas are well-qualified by their education and experience to opine on the use of the Black model to estimate the Companies' cost of providing the Provider of Last Resort (POLR) service as re-

defined under Ohio law due to the passage of S.B. 221. Moreover, the Black model is an accepted methodology, as evidenced by the fact that the Commission concluded in the Companies' prior ESP proceeding, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, that the Black-Scholes model provides a reasonable basis for estimating the Companies' POLR costs and charges. Accordingly, the Commission should deny FES's motion and allow AEP Ohio's proffered testimony to be fully examined and tested during the hearing of this case.

I. The Strict Application Of Evidence Rule 702 Is Inappropriate Here.

The Commission is not bound by the Ohio Rules of Evidence. As FES noted in its motion, "the Commission 'uses[s] the rules of evidence for guidance in evaluating the evidence presented at hearing.'" (Mot. to Strike at 3, quoting *In the Matter of the Complaint of Kingsville Apartments aka Center Court Apartments, LLC v. Columbia Gas of Ohio, Inc.*, Case No. 05-1229-GA-CSS, Opinion and Order, at p. 10 (Apr. 4, 2007).) The Commission explained in *Kingsville Apartments*, however, that "Commission hearings are administrative in nature and do not require a strict application of the rules of evidence, as in a court of law." Id. Indeed, the PUCO "is not stringently confined by the Rules of Evidence," rather, it "is granted very broad discretion in the conduct of its hearings." *Greater Cleveland Welfare Rights Org. v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62, 68, citing *Elyria Tel. Co. v. Pub. Util. Comm.* (1953), 158 Ohio St. 441, 444.

Because the Commission is not strictly bound by Rule 702, it is not precluded from admitting evidence or testimony that otherwise might be subject to challenge in a court, particularly when a matter is tried to a lay jury. The broad latitude and discretion granted the Commission "stems from the recognition that Commission proceedings lack certain distinctive features of jury trials; importantly, fact-finding by a lay jury." *In the Matter of the Complaint of*

Brothers Century 21, Inc. v. The East Ohio Gas Co., Case No. 84-866-GA-CSS, 1986 Ohio PUC LEXIS 1954, Attorney Examiner's Report, at *4 (Feb. 24, 1986) (attached as Exhibit A). Indeed, the basis for many exclusionary rules is the risk of misuse by the jury. Id. Such evidence is excluded in cases involving a jury "because it is feared that a jury may accord undue weight to a potentially unreliable piece of evidence." Id.

In sharp contrast to the cases upon which FES relies, the testimony in this proceedings will be presented to experienced attorney examiners, knowledgeable in the subject matter area, and well equipped to evaluate expert testimony and the weight it should be afforded. The testimony ultimately will be reviewed by the Commission, which is charged by law to hear and decide complex matters that are often dependent on expert explication. The Commissioners and their attorney examiners are sophisticated, educated individuals who themselves are experts in the subject-matter of the proceedings before them and who can understand the need to weigh evidence and to ascribe to each item of evidence its appropriate probative value.

Courts have followed reasoning similar to that cited in the *BrothersCentury21* proceeding to allow expert evidence more freely in bench trials than in jury trials. See *Bank One, N.A. v. Echo Acceptance Corp.* (S.D.Ohio 2008), 2008 WL 1766891, at *3 (explaining that, "[a]bsent a jury, courts have substantial flexibility in admitting proffered expert testimony * * * and then deciding for themselves during the course of trial whether the evidence * * * deserves to be credited." (internal quotation omitted)); see also *U.S. v. Kalymon* (C.A. 6, 2008), 541 F.3d 624, 636 (stating that a court's discretion regarding the admission of expert evidence "is at its zenith during a bench trial."). Members of the Commission, being equally well-qualified (if not more qualified) to determine the reliability and amount of weight that should be accorded to a particular piece of evidence in proceedings like these, similarly retain discretion to hear and

evaluate for themselves the expert testimony offered regarding AEP Ohio's calculation of the estimated costs of its POLR obligations.

FES relies upon a number of Commission opinions to support its argument that the Commission "regularly relies on the Ohio Rules of Evidence when deciding whether to exclude testimony." (Mot. to Strike at 3.) Each of those proceedings is distinguishable from this case. Notably, none of the cited proceedings were cases involving rates; rather, the majority involved customer complaints. Neither did any of the cited proceedings address expert testimony. Expert testimony was at issue in *Greater Cleveland Welfare Rights Org.*, but the Commission's decision to exclude expert testimony was not, as FES characterized it, based solely on the witness' inability to answer questions relating to the study his testimony discussed, but also on the witness' inability to produce a copy of the report on the study. *Greater Cleveland Welfare Rights Org.*, 2 Ohio St.3d at 67. No such issue is present here.

Not only has FES failed to cite to a single instance where the Commission applied Rule 702 in a proceeding similar to these, FES has failed to demonstrate that such an application would be appropriate here. Indeed, such an application is unnecessary, not only because the expert evidence will be presented to a sophisticated trier-of-fact, but also because AEP Ohio has previously presented evidence of the same type as that to be presented in these proceedings in two prior hearings before the Commission. The Commission heard testimony and evaluated evidence concerning the application of the Black-Scholes, or unconstrained option, model during AEP Ohio's first (2009-2011) electric security plan ("ESP") proceedings, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO. The Commission recently heard testimony and evaluated evidence concerning the application of the improved Black, or constrained option, model during the remand proceedings of those cases. Importantly, in the 2009-2011 ESP remand proceedings, the

attorney examiner permitted testimony from the same witnesses and on the same issues that FES now seeks to have stricken from these proceedings.

Without question, the Commission is not bound by the Ohio Rules of Evidence and may use its discretion in deciding whether to admit the testimony of AEP Ohio witnesses LaCasse and Thomas regarding AEP Ohio's application of the constrained option model in the current ESP. The Commission, therefore, should deny FES's motion and should allow each witness' full testimony to be presented and tested during the hearing.

II. AEP Ohio's Expert Evidence Satisfies Rule 702.

Notwithstanding the fact that the Commission is not bound by the Ohio Rules of Evidence and the fact that the Commission has twice previously accepted similar expert evidence, the evidence that the Companies seek to introduce through the testimony of Dr. LaCasse and Ms. Thomas satisfies the requirements of Rule 702. Witnesses LaCasse and Thomas are more than sufficiently qualified to present testimony about AEP Ohio's use of the constrained option model to estimate the costs of the Companies' POLR obligations and the constrained option model is a standard industry tool for evaluating options.. FES's arguments to the contrary are unpersuasive.

A. Dr. LaCasse and Ms. Thomas are qualified to testify about the constrained option model.

AEP Ohio witnesses LaCasse and Thomas are qualified to provide the testimony that FES asks the Commission to strike. It is a well-established that Rule of Evidence 702 embodies a liberal standard of admissibility for expert opinions. See *Nimely v. City of New York,* 414 F.3d 381, 395-96 (C.A.2, 2005) (discussing federal rule). A witness may be "qualified as an expert by

specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Ohio Evid. R. 702(B).

An expert witness need not, however, be the most qualified expert available. See *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶78. An expert witness need not necessarily be familiar with accepted literature or published standards in his area of specialization. *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., P.C.* (C.A.6, 2004), 388 F.3d 976, 980-81; *Hertzfeld v. Hayward Pool Prods.*, Lucas App. No. L-07-1168, 2007-Ohio-7097, at ¶20. Indeed, an expert need not even have experience with the specific object, fact-pattern, or procedure at issue. See *Hertzfeld,* 2007-Ohio-7097, at ¶20 (holding, "[t]he relevant area of inquiry * * * should not be defined so narrowly as to exclude testimony which would assist the trier of fact."). Nor must the expert have provided expert testimony on the same topic before. See id. at ¶28. The expert must simply "demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror." *Scott v. Yates* (1994), 71 Ohio St.3d 219, 221, citing *State Auto Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151.

Both Dr. LaCasse and Ms. Thomas are qualified to provide testimony on the constrained option model. The Commission's recognition of their qualification is demonstrated by the fact, discussed above, that each witness already presented testimony on the constrained option model in the Companies' 2009-2011 ESP remand proceedings in July 2011. The model presented in testimony sought to be presented here is nearly identical to that presented there. Indeed, Dr. LaCasse's testimony in the remand proceedings was subject to a motion to strike on the same grounds as those FES presents here, and that motion to strike was denied. (See Case Nos. 08-917-EL-SSO, 08-918-EL-SSO; Tr. Vol. V at 635-636, 643-644, 653 (July 28, 2011).)

AEP Ohio has further demonstrated each witness' qualifications in the each witness' direct testimony. Dr. LaCasse holds a Ph. D. in economics and has extensive experience in that field. (See Dir. Test. of Dr. Chantalle LaCasse at 1-3, Ex. CL-1.) It is evident from Dr. LaCasse's testimony that she possesses more than enough "experience, training, or education" related to economic models to satisfy Rule 702(B). Laura Thomas has extensive experience in electric rate design, including cost of service and cost recovery, as well as expertise in the area of electric utility regulatory compliance. (See Dir. Test. of Laura J. Thomas at 1-2.) Ms. Thomas' experience makes her well-qualified to offer testimony on the Companies' use of the constrained option to estimate the Companies' cost of satisfying the statutorily-imposed POLR obligation. Both witnesses, therefore, are qualified to testify about the constrained model and their testimony on that subject should be allowed.

B. The constrained option model is an acceptable methodology that may be properly utilized in this proceeding.

The subject of Dr. LaCasse and Ms. Thomas' testimony, AEP Ohio's use of the constrained option model to estimate the costs of its POLR obligation, meets the requirements of Rule 702(C). As FES points out, the Black model, the model upon which the constrained option model is based, is a widely-used model that was developed to calculate the value of options on commodity futures (Mot. to Strike at 1, citing John C. Hull, *Options, Futures, and Other Derivatives*, 234-66 (5th ed. 2002), at 287-288, 508-510.) AEP witness Makhija, whose qualifications as an expert FES does not challenge, has characterized the Black model as a "standard" model. (Dir. Test. of Dr. Anil Makhija at 4.) The audit report in the Companies' 2010 fuel adjustment clause proceeding, Case No. 10-268-EL-FAC noted at page 3-22, note 19, that the Black model is a "standard industry tool to evaluate an option." Moreover, the Commission accepted the Companies' testimony regarding the use of the Black-Scholes model to

estimate the costs of the Companies' POLR obligations in the post-S.B. 221 regulatory framework in the prior ESP proceeding. In addition, the constrained Black option model, which both Ms. Thomas and Dr. LaCasse support in this proceeding, has been admitted into evidence for the Commission's consideration in AEP Ohio's 2009-2011 ESP remand proceedings.

FES' motion is predicated mainly on its position that the constrained option model cannot properly be used in this proceeding because it has never been used to calculate POLR costs in any prior proceedings. (Mot. to Strike at 14.) Its position is faulty for several reasons. First, as noted the Black-Scholes option model was used in the Companies' prior ESP proceeding to evaluate the Companies' cost of satisfying their POLR obligations and the Commission implicitly accepted that methodology in approving the Companies' POLR charges. Second, it is not at all surprising that there is no other precedent for using the constrained options model to estimate POLR costs because the need to estimate such costs arises here only because of the unique POLR obligations imposed by the hybrid regulatory system mandated by S.B. 221. Third, FES' assertion that the constrained option model is inadmissible in this proceeding because it "was developed solely for use in this case and in [AEP Ohio's 2009-2011 ESP remand proceedings]," (Mot. to Strike at 14), is illogical because it suggests that no scientific methodology may ever be adapted for a new use. According to FES' argument, the Commission may never consider a new methodology to determine a utility's proper rates and charges even though the utility is actually exposed to new risks and costs that did not previously exist. FES' argument would tie the Commission to past practices regardless of the obvious and significant changes in the regulatory landscape.

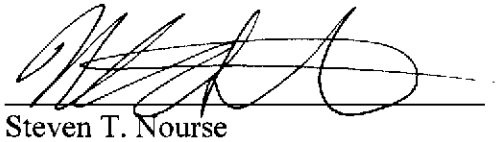
The Companies relied upon the Black-Scholes model in the prior ESP proceedings, and are now relying on the constrained Black model in this proceeding, because they are well-suited

for estimating the costs associated with their newly re-defined POLR risk. In this proceeding, as in the prior proceeding, the AEP Ohio witnesses explain why the options model, a standard industry tool for valuing options, is properly adapted to estimate POLR costs. The Commission should not preclude this highly-relevant testimony merely because it is a new application of an existing methodology. Testimony on the application of the constrained option model to calculate AEP Ohio's POLR obligation satisfies Rule 702(C) and should be allowed to be presented at hearing.

CONCLUSION

The Commission is not required to strictly analyze AEP Ohio witnesses LaCasse and Thomas or their testimony on the constrained option model based upon Rule 702. That Rule is intended to prevent lay juries from being confused by unreliable scientific testimony. Even were Rule 702 to apply, however, the expert witnesses and testimony that AEP Ohio proffers are admissible under the Rule. Dr. LaCasse and Ms. Thomas have impeccable credentials for supporting the proffered testimony. The options model is a standard industry tool that should not be summarily rejected here just it is being used to in a new application. For these reasons, FES's motion to strike testimony should be denied and the expert evidence that AEP Ohio presents should be admitted for full consideration at hearing.

Respectfully Submitted,



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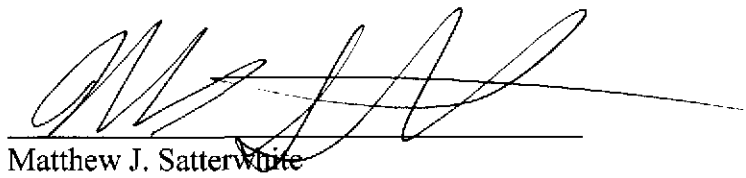
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Motion to Strike Testimony Filed by FirstEnergy Solutions Corp.* has been served upon the below-named counsel and Attorney Examiners via electronic mail this 7th day of September, 2011.



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