

4

**FAX**

**BEFORE THE  
PUBLIC UTILITY COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company : Case No. 10-2376-EL-UNC  
and Columbus Southern Power Company for Authority to :  
Merge and Related Approvals. :

In the Matter of the Application of Columbus Southern : Case No. 11-346-EL-SSO  
Power Company and Ohio Power Company for Authority to : Case No. 11-348-EL-SSO  
Establish a Standard Service Offer 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 Ohio Power Company for Approval of : Case No. 11-349-EL-AAM  
Certain Accounting Authority : Case No. 11-350-EL-AAM

In the Matter of the Application of Columbus Southern :  
Power Company to Amend its Emergency Curtailment : Case No. 10-343-EL-ATA  
Service Riders :

In the Matter of the Application of Ohio Power Company to :  
Amend its Emergency Curtailment Service Riders : Case No. 10-344-EL-ATA

In the Matter of the Commission Review of the Capacity :  
Charges of Ohio Power Company and Columbus Southern : Case No. 10-2929-EL-UNC  
Power Company :

In the Matter of the Application of Columbus Southern :  
Power Company for Approval of a Mechanism to Recover : Case No. 11-4920-EL-RDR  
Deferred Fuel Costs Ordered Under Ohio Revised Code :  
4928.144 :

In the Matter of the Application of Ohio Power Company for :  
Approval of a Mechanism to Recover Deferred Fuel Costs : Case No. 11-4921-EL-RDR  
Ordered Under Ohio Revised Code 4928.144 :

**MEMORANDUM CONTRA  
FIRSTENERGY SOLUTIONS CORP.'S MOTION TO STRIKE  
THE OHIO ENERGY GROUP**

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business.  
Technician SM Date Processed OCT 26 2011

RECEIVED-DOCKETING DIV  
2011 OCT 25 PM 4:35  
PUCO

Pursuant to §4901-1-12 of the Ohio Administrative Code, the Ohio Energy Group ("OEG") hereby submits this Memorandum Contra the Motion to Strike filed by FirstEnergy Solutions ("FirstEnergy") on October 25, 2011 ("Motion to Strike"). The reasons in support of OEG's Memorandum Contra are discussed below.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

**BOEHM, KURTZ & LOWRY**

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: [mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)

[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)

October 25, 2011

**COUNSEL FOR OHIO ENERGY GROUP**

### MEMORANDUM IN SUPPORT

In its Motion to Strike, FirstEnergy alleges that the testimony of witnesses Joseph Hamrock and Peter Baker filed on October 21, 2011 should be stricken from the record because, according to FirstEnergy, the testimony is outside the proper scope of rebuttal testimony.<sup>1</sup> FES' argument is one of form over substance and should be rejected. The Commission has broad discretion to allow evidence on the record necessary to determine the issues in a proceeding. The disputed testimony further develops the record in this proceeding, assisting the Commission in making an informed decision on the issues in this case. Accordingly, the Commission should deny FirstEnergy's Motion to Strike.

The Commission "...is afforded wide discretion to allow the admission of evidence necessary to create a complete record for the resolution of issues before it."<sup>2</sup> The Commission is not strictly bound by the rules of evidence.<sup>3</sup> Further, Ohio Adm. Code §4901-1-38(B) of the Ohio Adm. Code provides that the Commission "may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case." Accordingly, the Commission is not bound by FirstEnergy's limited interpretation of the proper scope of rebuttal testimony. The Commission may admit evidence, such as the testimony at issue, which is important to resolving a proceeding. In this case, the testimony of Mr. Hamrock and Mr. Baker can assist the Commission in considering the Distribution Investment Rider in accordance with R.C. 4928.143(B)(2)(h).

In a recent AEP ESP case on remand from the Supreme Court, the attorney examiner addressed a motion to strike based, in part, on an argument that "[r]ebuttal is not appropriate where it could have

---

<sup>1</sup> Motion to Strike at 5. Industrial Energy Users-Ohio joined the Motion to Strike in a Memorandum in Support filed Oct. 25, 2011.

<sup>2</sup> *In the Matter of the Application of Water and Sewer LLC for an Increase in Rates and Charges*, PUCO Case No. 03-318-WS-AIR, Entry (Nov. 24, 2003) at 2.

<sup>3</sup> *S.G. Foods v. FirstEnergy Corp.*, Case Nos. 04-28-EL-CSS et al., Entry (March 7, 2006) at 29 (citing *Greater Cleveland Welfare Rights Org. Inv. v. Pub. Util. Comm.*, 2 Ohio St. 3d 62 (1982)).

been presented as part of the party's direct case."<sup>4</sup> The examiner denied the motion to strike, noting that "[t]he Commission will give this testimony its proper weight."<sup>5</sup> The Commission has denied motions to strike under a similar rationale in the past.<sup>6</sup> In the present case, the Commission can also give the testimony of Mr. Hamrock and Mr. Baker appropriate weight without resorting to the extreme approach of striking all of their testimony.

Further, in the AEP ESP remand case, the Commission upheld the attorney examiner's ruling for various reasons, including the fact that "...parties were afforded the opportunity to cross-examine [the witness]...."<sup>7</sup> Here, parties have the opportunity to cross-examine Mr. Hamrock and Mr. Baker on their rebuttal testimony. Both the admission of the disputed rebuttal testimony and the opportunity for cross-examination by other parties can assist in the development of a fuller record in this case. Thus, the Commission should deny FirstEnergy's Motion to Strike.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

**BOEHM, KURTZ & LOWRY**

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: [mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)

[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)

October 25, 2011

**COUNSEL FOR OHIO ENERGY GROUP**

<sup>4</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, etc.*, PUCO Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Remand Tr. V at 637, lines 17-19.

<sup>5</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, etc.*, PUCO Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Remand Tr. V at 653, lines 2-7.

<sup>6</sup> *In the Matter of the Complaint of Allnet Communications Services, Inc., Complainant, v. The Ohio Bell Telephone Company*, Case No. 86-771-TP-CSS, Opinion and Order (April 15, 1993) at 3 ("The Commission will give the testimony that is the subject of the motions to strike whatever weight is appropriate in the context of this proceeding.").

<sup>7</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, etc.*, PUCO Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Order on Remand (Oct. 3, 2011) at 8.