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

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

The Office of the Ohio Consumers' Counsel ("OCC"), an intervenor in this proceeding on behalf of residential utility customers,[1] moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to strike portions of the reply brief filed in this proceeding by Ohio Power Company ("AEP Ohio" or "Company") on July 9, 2012. In particular, OCC moves 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:

- 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

[1] R.C. 4911.02.

RSR…" through "RPM pricing and $188.88/MW-day.", including the accompanying footnotes and the correction docketed on July 10, 2012.

- 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,".
- 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."
- All of Section III.A.3, beginning on page 97 and ending on page 99, including the accompanying footnote.
- Attachment A.
- Attachment B.

This material unduly prejudices intervenors in this case, and the Commission should thus strike these portions of AEP Ohio's Reply Brief.[2]

There is good cause for granting OCC's motion, as explained in the following memorandum.

[2] Some of the identified material was also mentioned during the Oral Argument held before the Commission on July 13, 2012. If the Commission grants OCC's Motion to Strike, OCC submits that references to the identified material made during the Oral Argument should not be considered part of the record of this proceeding.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The evidentiary hearing in this proceeding began on May 17, 2012 and concluded on June 15, 2012. On the last day of the hearing, the Attorney Examiners set the briefing schedule. Initial briefs were filed on June 29, 2012 and reply briefs were filed on July 9, 2012.[3]

In its reply brief filed on July 9, 2012, AEP Ohio included several discussions that are based on information not contained in the record. Specifically, the Company discussed the following:

- The Company's recalculation of its projected return on equity ("ROE") based on the Commission's Opinion and Order in Case

[3] Tr. Vol. 17 at 4959.

No. 10-2929-EL-UNC ("Capacity Charge Case")[4] and how it relates to the Retail Stability Rider ("RSR").[5]

- The reaction of Standard & Poor's Research ("S&P"), included as Attachment A to AEP Ohio's reply brief, to the Commission's Capacity Charge Order.[6]
- Power outages that resulted from storms in late June 2012.[7]
- 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.[8]

As discussed herein, this material unduly prejudices intervenors in this case. The Commission should thus strike these portions of AEP Ohio's reply brief.

II. ARGUMENT

The Commission has recognized that "it is improper to rely on claims in the brief which are unsupported by evidence within the record."[9] The Commission has also ruled that "[d]ocuments that are not part of the record, and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief, or filed after a hearing, and thereby be made a part of the record."[10] The Commission has determined that such documents are

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

[5] AEP Ohio Reply Brief at 29-30.

[6] Id. at 33-34 and Attachment A.

[7] Id. at 68-69.

[8] Id. at 97-99 and Attachment B.

[9] See Case No. 11-346-EL-SSO, Opinion and Order (December 14, 2011) at 16-17.

[10] *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order (November 21, 2006) ("*FAF Order*") at 3.

"hearsay, not excused by any exception to the rules of evidence governing hearsay, and [are] inadmissible as evidence."[11]

A. AEP Ohio Inappropriately Attached Non-Evidentiary Information to Its Reply Brief and Relied on the Information for Argumentation.

In this proceeding, AEP Ohio has attempted to include in the record, through the Company's reply brief, two documents that are not part of the record and were not designated as late-filed exhibits at hearing. Attachment A to the Company's brief is a July 2, 2012 statement by S&P regarding the Commission's Capacity Charge Order. Attachment B to AEP Ohio's brief is a recalculation of the ESP-MRO comparison based on the capacity price that the Company must charge competitive retail electric service providers under the Capacity Charge Order. Neither document was in the record of this proceeding prior to the Company filing its reply brief. Thus both documents are hearsay, do not fall under any exception to the hearsay rule, and are inadmissible as evidence.

AEP Ohio itself argued this same point just two years ago in a complaint case involving the City of Reynoldsburg and AEP Ohio's subsidiary, Columbus Southern Power Company ("CSP").[12] In that case, Reynoldsburg discussed in, and attached to, its reply brief a newspaper article from the January 23, 2010 Columbus Dispatch, which was published after the December 2, 2009 evidentiary hearing in the proceeding.[13]

AEP Ohio vehemently opposed Reynoldsburg's attempt to include the article in the record. The Company stated:

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[11] Id.

[12] *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Company* Case No. 08-846-EL-CSS.

[13] See id., CSP Motion to Strike (February 9, 2010) at 3-4.

> Reynoldsburg had ample opportunity to provide evidence to the record in this proceeding. Reynoldsburg is the Complainant in this case and in complaint proceedings before the Commission, a complainant has the burden of proving the allegation set forth in the complaint.[14]

AEP Ohio argued further that:

> The Commission also conducted an evidentiary hearing on December 2, 2009, where Reynoldsburg had ample opportunity to supplement the record with information under the process defined in the Commission's formal proceedings. But Reynoldsburg did not provide any documentation in support of this point when the record was open. Instead, Reynoldsburg improperly attaches a newspaper article to its post-hearing brief [sic]….[15]

In its motion to strike, the Company also noted the Commission's determination in *FAF* about the inequity in allowing such documents into the record through a reply brief.[16] In *FAF*, the Commission stated:

> [I]f we were to allow evidence to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document. Therefore, the motion to strike should be granted.[17]

AEP Ohio also cited the Commission's similar holding in *Wendell and Juanita Thompson v. Columbia Gas*.[18] In that proceeding, the Commission ruled:

> Documents that are not a part of the record in a proceeding cannot be attached to a post-hearing brief and be thereby made a part of the record. As noted by Columbia in its motion to strike, if we were to allow evidence to be admitted in such a manner, the documents in question would not be supported by testimony and the opposing party would have no opportunity to cross-examine

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[14] Id. at 4.

[15] Id.

[16] Id. at 5.

[17] *FAF Order* at 3-4.

[18] *City of Reynoldsburg*, CSP Motion to Strike at 5.

> regarding the documents or to rebut the arguments related thereto.[19]

Finally, the Company argued that:

> The Commission's concerns from *FAF Inc.* and *Wendell and Juanita* exist in this proceeding, caused by Reynoldsburg's improper inclusion of and discussion of the newspaper article. Reynoldsburg provided no testimony in support of this point and CSP had no opportunity to cross-examine a witness concerning the document or to rebut the issues that might be related to them. That is why the Commission has an evidentiary record and a proceeding to develop that record so that issues can be developed and evidence of record relied upon in post-hearing briefs and for the Commission to rely upon in reaching a decision.[20]

The Commission ultimately agreed with the Company: "The newspaper article in question is hearsay and consistent with Commission precedent and the Rules of Evidence should not be considered as part of the record in this case."[21]

In this proceeding, AEP Ohio is guilty of the same transgression that the Company so vehemently opposed in *City of Reynoldsburg*. Here, the Company attached to its reply brief two documents – Attachments A and B – that were not part of the record in this proceeding. Both documents involved the Commission's decision in the Capacity Charge Case, which was issued after the hearing in this proceeding concluded

The Capacity Charge Order was issued seven days before the Company's reply brief was filed. AEP Ohio had ample opportunity to seek to reopen the proceeding under Ohio Adm. Code 4901-1-34 in order to submit the documents as evidence. The Company did not. Instead, the Company chose to improperly include the documents as

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[19] *In the Matter of the Complaint of Wendell and Juanita Thompson v. Columbia Gas of Ohio, Inc.*, Case No. 04-22-GA-CSS, Opinion and Order (June 1, 2005) at 50.

[20] *City of Reynoldsburg*, CSP Motion to Strike at 5-6.

[21] Id., Opinion and Order (April 5, 2011) at 28.

part of its reply brief. In AEP Ohio's own words, "it is inappropriate to attach non-evidentiary information to a post-hearing brief and rely on it for argumentation."[22]

The situation with the Company's Attachment A is on point with the *City of Reynoldsburg* case. Similar to the circumstances in *City of Reynoldsburg*, AEP Ohio included as Attachment A to its reply brief a release from a news source and relied on that source for the truth of the matter asserted.[23] Thus, the Commission's finding in *City of Reynoldsburg* is squarely applicable to the circumstances in this case.

As for Attachment B, although it is not a news clipping, it still is inappropriate. The attachment involves the use of post-hearing information to make new calculations concerning the ESP-MRO test and to argue that the ESP is more favorable in the aggregate than an MRO.[24] The Company's new calculations cannot be subjected to cross-examination or rebuttal by opposing parties. This, too, is impermissible for inclusion in a post-hearing reply brief.

Attachments A and B are extra-record documents and are thus inappropriate for inclusion in a reply brief. The documents are not supported by testimony and opposing parties have no opportunity to conduct cross-examination regarding the documents or to rebut the arguments AEP Ohio related to the documents. The Commission should grant OCC's motion, and strike Attachments A and B as well as the arguments related to them on pages 33-34 and 97-99, including the accompanying footnote.

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[22] Id., CSP Motion to Strike at 3.

[23] See AEP Ohio Reply Brief at 33-34.

[24] Id. at 97-99.

B. AEP Ohio's Discussion of the Impact of the Capacity Charge Decision on the Company's Return on Equity Also Is Not Subject to Cross-Examination or Rebuttal, and Thus It Should Be Stricken.

In addition to the recalculations found in Attachment B, AEP Ohio also used its reply brief to project the impact of the Commission's Capacity Charge Order on the Company's ROE.[25] According to footnote 3 of the reply brief, the Company began with a table in AEP Ohio witness Allen's rebuttal testimony, then calculated the impact of the $188.88/MW-day capacity price from the Capacity Charge Order to determine what the Company deems to be the impact of the Commission's decision on the Company's ROE. Based on this calculation, the Company argues:

> This shows that the RSR is needed not only to recover the difference between the $188/MW-day and RPM rates, but also to provide additional financial stability to AEP Ohio during the ESP term. Adoption of an RSR that is larger than proposed (larger than $2.MWh but still enough produce $929 million annually in non-fuel generation revenue) is needed. As referenced above, using the RSR only for recovery of the deferral (as Staff suggests) would only yield an unacceptably low ROE of 5.9% in 2013; adopting the $929 non-fuel generation revenue target for the RSR would yield the 7.5% marginal ROE in 2013 projected as part of AEP Ohio witness Sever's testimony. (AEP Ohio Ex. 108 at Ex. OJS-2.) Alternatively, the Commission could grant the RSR as proposed (*i.e.*, $2/MWh) while separately providing for a new nonbypassable charge to recover the difference between RPM pricing and $188.88/MW-day.[26]

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[25] Id. at 29-30.

[26] Id. at 30. On July 10, 2012, AEP Ohio docketed a correction to the last sentence in the paragraph. According to the Company, the corrected sentence should read: "Alternatively, the Commission could grant the RSR as proposed (*i.e.*, using a $929 million non-fuel generation revenue target which would involve at $2.75/MWh charge based on recovery to $188.88/MW-day outside of the RSR) while separately providing for a new nonbypassable charge to recover the difference between RPM pricing and $188.88/MW-day." OCC's Motion to Strike also covers the corrected sentence.

Similar to Attachment B, the Company here uses post-hearing information to make new calculations and to argue for Commission approval of the RSR. In addition, AEP Ohio proposes an alternative that has not been previously presented in the record.

The Company's new calculations and arguments cannot be subjected to cross-examination or rebuttal by opposing parties. For the reasons discussed in the previous section, this is impermissible for inclusion in a post-hearing reply brief. The Commission should grant OCC's motion, and strike the entire full paragraph on page 29, including the accompanying footnote, and the entire first paragraph on page 30, including the correction AEP Ohio docketed on July 10, 2012.

C. AEP Ohio's Discussion of the June Power Outages Is Based on Information Not in the Record, and Thus It Should Be Stricken.

In its reply brief, AEP Ohio discussed the PUCO Staff's recommendation that the Commission find the Company's reliability expectations are not aligned with customers' expectations.[27] As part of this discussion, 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:

> The 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. Distribution systems in Ohio, West Virginia and Maryland are not built to withstand hurricane force winds, but that is the weather that presented itself. The recent outages should be considered a Major Storm Event and not be considered in the reliability standards set by the

[27] Id. at 68.

> Commission, but such an unavoidable event can impact customers' impressions of the system.[28]

OCC recognizes that the storms had a serious impact on Ohio consumers, and OCC does not wish to denigrate that impact. Nevertheless, this proceeding must be conducted according to Ohio law,[29] the Commission's standards[30] and the rules of evidence. The fact remains that information regarding the storms is not part of the record in this proceeding, and thus the Company's use of the information to support its arguments is improper.[31] The information was not supported by testimony, and there is nothing in the record regarding the strength of the winds or the ability of the Company's system to withstand hurricane force winds.

There is also no opportunity for opposing parties to cross-examine any Company witness regarding other factors that may have contributed to the outages and repairs associated with the storm damage. For example, there is no opportunity to examine the age and condition of the Company's electric lines in rural areas, and whether the condition of those lines may have contributed to some of the outages and the time needed to make repairs. There is also no opportunity to examine how AEP Ohio's reductions in its service personnel over the past several years may have affected the Company's ability to respond to the outages.

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[28] Id. at 68-69.

[29] R.C. 4905.09 requires that "[i]n all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[30] See the discussion of Commission precedent in Section II.A.

[31] See note 9, supra.

The Company's arguments are based on information not in the record of this proceeding, and are thus improper.[32] The Commission should strike the above-quoted passage from the Company's reply brief.

III. CONCLUSION

AEP Ohio's reply brief contains information not included in the record of this proceeding, which is contrary to Commission practice and precedent. The Commission should grant OCC's motion and should strike the portions of the Company's reply brief identified herein.

Respectfully submitted,

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[32] See *FAF Order* at 3-4. See also *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 05-1102-TP-ORD, Entry on Rehearing (July 9, 2008) at 14 ("The Commission was correct to not base its decision on any information that was outside of the record.").

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served by electronic mail to the persons listed below, on this 13th day of July 2012.

/s/ Terry L. Etter
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Summary: Motion Motion to Strike Portions of AEP Ohio's Reply Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.