

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Complaint of</b>	)	
<b>Evelyn and John Keller</b>	)	
	)	
<b>Complainants,</b>	)	<b>Case No. 12-2177-EL-CSS</b>
	)	
<b>v.</b>	)	
	)	
<b>Ohio Power Company,</b>	)	
	)	
<b>Respondent.</b>	)	

---

**OHIO POWER COMPANY’S MOTION TO STRIKE TESTIMONY**

---

Pursuant to Rules 4901-1-12 and 4901-1-27(B)(4) and (7)(d), Ohio Administrative Code, and Rule 802 of the Ohio Rules of Evidence, Ohio Power Company (“AEP Ohio” or the “Company”) moves to strike portions of the direct testimony that Complainants have proffered in this proceeding. As demonstrated in the attached memorandum in support, AEP Ohio seeks to strike portions of the direct testimony of John Keller on the grounds that those portions sought to be stricken constitute inadmissible hearsay not within any exception or are irrelevant to this proceeding. Accordingly, AEP Ohio respectfully requests that the following portions of the direct testimony of John Keller be stricken:

- Page 2, the first sentence of “A7”
- Page 2, the portion of the third sentence of “A7” from “and they replied” through the end of the sentence
- Page 2-3, the portion of the fourth sentence of “A7” from “and they repeatedly told me” through the end of the sentence.
- Page 3, the fifth sentence of “A7”

- Page 3, the sixth sentence of “A7”
- Page 3, the seventh sentence of “A7”
- Page 3, the first sentence of “A9”
- Page 11, the second line from the top, the sentence that begins with “Fourth”
- Page 11-12, “Q22” and “A22” in their entirety

Respectfully submitted,

/s/ Yazen Alami

Steven T. Nourse

Yazen Alami

American Electric Power Service Corporation

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

yalami@aep.com

Counsel for Ohio Power Company

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The Commission should strike the identified portions of the direct testimony of John Keller because the portions sought to be stricken constitute inadmissible hearsay not within any exception or address topics that are outside the scope of this proceeding and irrelevant to the subject matter of this case. Accordingly, the identified portions of the direct testimony of John Keller should be stricken.

### **II. ARGUMENT**

The portions of testimony on pages 2-3 and on page 11 of the direct testimony of John Keller as identified in AEP Ohio's motion to strike constitute impermissible hearsay not within any exception and, therefore, should be stricken pursuant to Rule 802 of the Ohio Rules of Evidence. Although the Commission is granted broad discretion in the conduct of its hearings and is not strictly bound by the Ohio Rules of Evidence, "such freedom from inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended." *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263, 126 N.E.2d 314 (1955) (reversing an order of the Commission relying in part on hearsay evidence as not being "based upon sufficient evidence, received under the established and recognized rules for the production of evidence."); *See also, Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6, 453 N.E.2d 1262 (1982) (holding that while administrative agencies are not bound by the strict rules of evidence, they "should not act upon evidence which is not admissible, competent, or probative of the facts which it is to determine").

The portions of Mr. Keller's testimony describing conversations he had with ODOT personnel in the days after the Derecho storm should be stricken as inadmissible hearsay. The out-of-court statements made by ODOT personnel during those conversations are being offered by Mr. Keller to prove the truth of the matter asserted. Offering those statements for that purpose is classic hearsay that should be stricken from Mr. Keller's testimony. Otherwise, AEP Ohio will be unfairly prejudiced. Because the ODOT personnel Mr. Keller spoke with will not appear at the hearing in this case, the Company – and the Commission – is denied the opportunity to explore the circumstances under which the statements were made or to test the veracity of the statements through cross-examination. Moreover, it is unknown (and cannot be explored through cross-examination) the extent and nature of the conversations between ODOT and the Company that led to the statements ODOT personnel made to Mr. Keller. Such information is necessary to place the statements in the proper context and to assess whether they are actually probative of the facts alleged. Without being able to test the probativeness of the statements or explore the competency of the declarants, the Commission should not consider the portions of Mr. Keller's testimony related to the statements made by ODOT personnel. Admitting the statements also would unfairly prejudice AEP Ohio due to the inability to confront and cross-examine the declarants. The testimony, therefore, should be stricken as inadmissible hearsay not within any exception.

Evidence, including witness testimony, that is not relevant to the issues before the Commission in a proceeding should be stricken. *See In the Matter of the Application of Columbus Southern Power Co. for Approval of an Electric Security Plan*, Case No. 08-917-ELSSO, *et. al*, Entry at 6 (July 19, 2011) (striking witness testimony relating to issues outside the scope of the issues on remand); *In re. Verizon Wireless*, Case No. 03-515-TP-ARB, Opinion at 4

(Nov. 13, 2003) (striking witness affidavit based in part upon the fact that the information contained therein was “not relevant” to the case); *In re. TDS MetroCom, Inc.*, Case No. 02-1254-TP-ARB, Entry at 2 (Sept. 27, 2002) (striking witness testimony on issues that did “not assist the Commission” in deciding the relevant issues in the case). The portion of Mr. Keller’s testimony at issue here is similarly outside the scope of this proceeding, is not relevant to the Complaint, and will not assist the Commission in deciding this case. It should be stricken accordingly.

Question and answer 22 on pages 11-12 of Mr. Keller’s direct testimony is not relevant to, and thus should not be considered in, this proceeding. Mr. Keller’s testimony in question and answer 22 describes his “thoughts” on the Commission’s complaint procedure. In the answer to question 22, Mr. Keller seeks to expand this proceeding into a review of the Commission’s formal complaint process. Mr. Keller also attempts to expand the scope of this case to include a debate regarding how the Company should recover its storm-related costs. Such topics are irrelevant to this proceeding; Mr. Keller even admits that these issues are “technically beyond the scope of this proceeding.” (Keller Direct at 12). As the Commission is aware, the merits of the Company’s recovery of its storm-related costs are the subject of a separate proceeding currently pending before the Commission. Accordingly, any testimony in this case on the merits of storm-related cost recovery is misplaced and would only serve to needlessly extend this proceeding. Testimony offering a review of Commission’s complaint procedure is likewise inappropriate in this proceeding. Question and answer 22 on pages 11-12 of Mr. Keller’s direct testimony is outside the scope of this proceeding, is not relevant to the Complaint, and will not assist the Commission in deciding this case, it should be stricken.

### III. CONCLUSION

While leeway on procedural and evidentiary matters may be justified for other *pro se* complainants, Mr. Keller is an experienced trial attorney who is doubtless familiar with the Ohio Rules of Evidence and their prohibitions. For the foregoing reasons, AEP Ohio respectfully requests that the Commission strike the identified portions of Mr. Keller's direct testimony as discussed above.

Respectfully submitted,

/s/ Yazen Alami

Steven T. Nourse

Yazen Alami

American Electric Power Service Corporation

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

yalami@aep.com

Counsel for Ohio Power Company

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail upon counsel for Complainants at the address listed below on this 20<sup>th</sup> day of August, 2013.

/s/ Yazen Alami

Yazen Alami

John Keller

1424 Jewett Road

Powell, Ohio 43065

jkev@columbus.rr.com

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

**Commission of Ohio Docketing Information System on**

**8/20/2013 4:09:26 PM**

**in**

**Case No(s). 12-2177-EL-CSS**

Summary: Motion to Strike and Memorandum in Support of Ohio Power Company  
electronically filed by Mr. Yazen Alami on behalf of Ohio Power Company