

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo) Case No. 10-176-EL-ATA
Edison Company for Approval of a New)
Rider and Revision of an Existing Rider.)

**MOTION TO STRIKE FIRSTENERGY’S SURREPLY REGARDING THE
MOTION TO INTERVENE OF SUE STEIGERWALD, CITIZENS KEEPING
THE ALL-ELECTRIC PROMISE (CKAP), JOAN HEGINBOTHAM, AND BOB
SCHMITT HOMES, INC.**

**BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of approximately 1.9 million residential electric customers of FirstEnergy,¹ respectfully moves to strike FirstEnergy’s pleading entitled “Surreply in Support of Ohio Edison Company and the Toledo Edison Company Contra Motion to Intervene of Sue Steigerwald, Citizens Keeping the All-Electric Promise (CKAP), Joan Heginbotham, and Bob Schmitt Homes, Inc.” (“Surreply”). FirstEnergy filed the surreply on June 30, 2010, in furtherance of its efforts to prevent Ohioans, including consumers, from participating in a case affecting their rates.

OCC makes this motion (“Motion to Strike”²) because there is no provision in the Commission’s rules that allows FirstEnergy to file a surreply in response to a reply memorandum, and the Commission has not waived its rules or prescribed any different

¹“FirstEnergy” is defined as Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating Company.

² OCC’s motion is made consistent with the Ohio Administrative Code and the Ohio Civil Rules of Practice. See Ohio Admin. Code 4901-1-12.

practice. The reasons for granting OCC's Motion to Strike are more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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CONSUMERS' COUNSEL

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 2, 2010, a Motion to Intervene was filed by Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham and Bob Schmitt Homes, Inc. (collectively, “Movants”) with the Public Utilities Commission of Ohio (“PUCO” or “Commission”).³ Counsel for Movants served copies of their motion on parties by mail, on that same date, May 27, 2010.⁴ Movants’ pleading was date stamped at the PUCO on June 2, 2010. On June 17, 2010, FirstEnergy filed its memorandum contra the motion to intervene. On June 24, 2010, OCC filed its reply to FirstEnergy’s memo contra. Movants filed their reply to FirstEnergy’s memo contra the next day. Both OCC and Movants requested that the Commission not consider the Companies’ memo contra because it was untimely. On June 30, 2010, FirstEnergy filed a surreply.

³ Movants filing their pleading by mailing it to the Commission as is permitted by Rule 4901-1-02 of the Ohio Administrative Code.

⁴Service on a party, under the PUCO’s rules, may be accomplished in this manner. See Ohio Admin. Code 4901-1-05(C).

II. ARGUMENT

FirstEnergy's surreply, purportedly to support its own memorandum contra, should be stricken. First, there is no provision in the Ohio Administrative Code for the filing of a "surreply," and the Commission has not waived its rules or prescribed any different practice or procedure to be followed in this particular case. Second, FirstEnergy fails to show good cause as to why it should be permitted to respond to Movants' and OCC's reply memoranda.

FirstEnergy's "surreply" is not a pleading authorized under Ohio Admin. Code 4901-1-12.⁵ The rules allow for the filing of a motion, memoranda contra, and a reply memoranda contra.⁶ Movants filed a motion to intervene. FirstEnergy filed its memorandum contra to Movants' motion. Movants and OCC filed reply memoranda to FirstEnergy's memo contra. FirstEnergy is provided no further opportunity to file a responsive pleading to the reply memoranda.⁷

Moreover, neither the Attorney Examiner nor the Commission has, upon its own motion or by motion of a party, waived any requirement, standard, or rule, or prescribed

⁵ See *In the Matter of the Complaint of The Cleveland Electric Illuminating Company, Complainant, v. Medical Center Company, American Electric Power Company, Inc., American Electric Power Service Corp., and Ohio Power Company, Respondents, Relative to an Alleged Violation of the Certified Territory Act*, Case No. 95-458-EL-UNC, Entry at n.1 (July 9, 1999) (where CEI filed a surreply to a reply to CEI's memo contra, the Attorney Examiner specifically stated that "[t]he Commission's procedural rules do not provide the opportunity for a party to file a surreply to a memorandum contra" and disregarded CEI's surreply).

⁶ See *In the Matter of the Complaint of James E. Pietrangelo, II, Complainant, v. Columbia Gas of Ohio, Inc., Respondent*, Case No. 99-694-GA-CSS, Entry at n.1 (September 22, 1999) (Attorney Examiner noting that Rule 4901-1-12 only recognizes a memorandum contra and a reply to motions filed in Commission proceedings).

⁷ Practice at the PUCO is that parties seek leave to file pleadings that are not otherwise permitted. See Ohio Admin. Code 4901-1-31(A), allowing for the filing of memoranda upon the motion of a party seeking leave to file such a pleading. Motions must be in writing and accompanied by a memorandum in support under Ohio Admin. Code 4901-1-12(A). FirstEnergy declined to follow these rules as well.

different practices or procedures to be followed in this proceeding.⁸ Likewise, neither the Attorney Examiner nor the Commission has requested, pursuant to Ohio Admin. Code 4901-1-31(A), any additional pleadings on the subject of Movants' motion to intervene. Because no procedural schedule has been issued allowing for additional responsive pleadings regarding Movants' motion to intervene, there has been no Commission sanctioning of further responsive pleadings by FirstEnergy.

While the Commission can allow further responsive pleadings for good cause shown⁹, FirstEnergy failed to satisfy the standard of "good cause." FirstEnergy argues that good cause exists because neither OCC nor Movants have shown prejudice, and that its filing has not delayed this proceeding, and raises important procedural concerns that should be considered.¹⁰ While delay may not have been caused by the filing, Movants will be prejudiced if the surreply is allowed.

Prejudice to the Movants can exist from the timing of FirstEnergy's filing, as FirstEnergy acknowledges.¹¹ FirstEnergy attempts to create the opportunity for it to have the last word on a matter on which Movants' -- not FirstEnergy -- bear the burden of proof. Where, by rule, the movant is entitled to the final argument in pleadings, it would be patently unfair and prejudicial for the PUCO to allow the opposing party the last word.

⁸ See Ohio Admin. Code 4901-1-38(B).

⁹ Id.

¹⁰ See surreply at 3-4.

¹¹ Surreply at 3, where FirstEnergy states that "prejudice, for purposes of evaluating whether to accept late-filed documents, is that which results from the timing of the filing itself."

FirstEnergy's last word here is in the form of opining once again on the problems associated with allowing CKAP's intervention.¹²

FirstEnergy failed to follow the PUCO rules, which resulted in an untimely memorandum contra that was followed by a pleading not permitted under the PUCO rules. The Commission should not allow it.

FirstEnergy is a sophisticated party with decades of experience before this Commission. It should be well versed in the Commission's rules pertaining to service and filing. The fact that there was a six-day delay between service of the motion to intervene and the docketing of the pleading does not mitigate or excuse FirstEnergy from complying with the Commission's rules.

Any delay that was caused was through no fault of Movants, but rather is a consequence of the PUCO rules. Movants, who do not have the benefit of being located within Columbus, complied with the Commission rules for service and filing by utilizing the U.S. mail service. There was no "untoward gamesmanship and mischief" that the Companies' insinuate occurred.¹³ While the pleading was not filed until six days after it was served, it would appear that FirstEnergy's suggestion of "mischief" by the Movants is nothing more than the consequence of regular mail delivery in the circumstance of an intervening holiday weekend (Memorial Day).

The Commission's rules contemplate the timing related to mail service, and permit, under Ohio Admin. Code 4901-1-07(B), an additional three days to be added to

¹² See Surreply at 4.

¹³ See FirstEnergy surreply at 2, where FirstEnergy claims that the PUCO rules "do not contemplate allowing a party to benefit by an extraordinary delay between the date on the certificate of service and when the opposint (sic) party actually receives that document."

response periods for pleadings served by mail. When three days is added to the fifteen-day response time to motions,¹⁴ the Companies' memorandum contra was due on June 14, 2010. The Companies filed their responsive pleading on June 17, 2010, with no explanation as to why their filing was late and without any request for extension of time to file their memorandum contra.¹⁵

Notably, the surreply fails to even argue that the delay in filing caused it to be unable to respond in a timely manner. The Company failed to argue that it did not receive the motion in a timely fashion (which could have been before the PUCO placed the documents on its Docketing Information System).

Because FirstEnergy submitted a pleading not permitted under the rules and because FirstEnergy failed to show good cause why the Commission should excuse its neglect and permit it to cure the defect, OCC's motion to strike FirstEnergy's surreply should be granted. Striking the surreply is consistent with Commission precedent,¹⁶ and would avoid prejudice to Movants.

¹⁴ See Ohio Admin. Code 4901-1-12(B)(1).

¹⁵ See Ohio Admin. Code 4901-1-13, which permits a party to file a motion for extension of time to file a document.

¹⁶ See e.g., *In the Matter of the Complaint of Communication Options, Inc., v. ValTech Communications LLC*, Case No. 04-658-TP-CSS, Opinion and Order at 4 (September 13, 2006) (Commission did not take supplemental brief into consideration where the filing of additional pleadings, following post hearing reply briefs, was not contemplated by schedule, was in violation of Rule 4901-1-31, and party did not seek permission to submit any additional pleadings); see also *In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio, the Office of the Ohio Consumers' Counsel, and Aqua Ohio, Inc. Relating to Compliance with Customer Service Terms and Conditions Outlined in the Stipulation and Recommendation in Case No. 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, Case No. 08-1125-WW-UNC, Finding and Order at 3 (May 26, 2010) (where, pursuant to Rule 4901-1-28, the Attorney Examiner invited interested persons of record to submit initial comments concerning the staff report and because "additional pleadings" were "not contemplated" by the examiner's entry, the Commission would not consider the additional pleadings filed after the initial comments).

III. CONCLUSION

FirstEnergy's surreply was not allowed under the Ohio Administrative Code. Because no additional pleadings outside of those permitted by rule were authorized or contemplated, FirstEnergy's surreply should be stricken from the record. FirstEnergy failed to show good cause why its neglect of the Commission's rules should be excused. Nor did FirstEnergy argue it was somehow prejudiced by the six-day period between the service and the filing of the motion to intervene.

For the reasons set forth above, OCC's motion to strike FirstEnergy's surreply should be granted. Further, Movants' motion to intervene should be granted, allowing Movants the full opportunity to participate in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Motion to Strike was served upon the persons listed below by electronic transmission and by first class U.S. Mail, postage prepaid, this 16th day of July, 2010.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/16/2010 5:00:19 PM

in

Case No(s). 10-0176-EL-ATA

Summary: Motion Motion to Strike FirstEnergy's Surreply Regarding the Motion to Intervene of Sue Steigerwald, Citizens Keeping the All-Electric Promise (CKAP), Joan Heginbotham, and Bob Schmitt Homes, Inc., by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.