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**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.)

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PUCO

**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**

Sue Steigerwald; Citizens For Keeping The All-Electric Promise (CKAP); Joan Heginbotham and; Bob Schmitt Homes, Inc. ("Movants"), by and through counsel, respectfully move 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, to prevent parties with a substantial interest in the proceedings from participating in a case affecting their rates.

Movants make this motion ("Motion to Strike") because FirstEnergy has failed to serve Movants with a copy of their Surreply as required and because there is no provision in the Commission's rules that allows FirstEnergy to file a surreply in response to a reply memorandum. The reasons for granting Movants' Motion to Strike are more fully explained in the attached Memorandum in Support.

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.
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Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On May 27, 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"). Counsel for Movants served copies of their motion on parties by mail, on that same date, May 27, 2010. 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 on because it was untimely. On June 30, 2010, FirstEnergy filed a surreply. As of July 13, 2010, FirstEnergy has not served Movants with a copy of their surreply by mail.

II. ARGUMENT

FirstEnergy can't follow the rules governing PUCO matters and their surreply should be stricken. First, the Ohio Administrative Code (OAC) requires service of all pleadings on a party. Second, there is no provision in the OAC for the filing of a surreply and the Commission has not waived its rules. Third, FirstEnergy fails to show good cause as to why it should be permitted to file a surreply.

OAC 4901-1-05(A) states "all pleadings or papers filed with the commission subsequent to the original filing or commission entry initiating the proceeding shall be served upon all parties, no later than the date of filing."¹ FirstEnergy served Movants with an electronic version of their surreply but have yet to provide service by mail. OAC 4901-1-05(C) provides guidance as to service and permits service personally, by mail, via facsimile transmission or by electronic message (email) under conditions.² Those conditions center on whether the party has consented to receive service by that means. In this matter, Movants have not consented to receive pleadings via facsimile or by electronic message. As mentioned, FirstEnergy served Movants with an email but have not served them personally or by mail. Since Movants have not consented to the service attempted by FirstEnergy, their efforts to serve Movants as prescribed by the OAC have failed and their surreply should be stricken.

A "surreply" is not a pleading authorized under Ohio Admin. Code 4901-1-12.³ FirstEnergy has filed one anyway. Do the rules not apply to them? Or do they just think

¹ OAC 4901-1-05(A)

² OAC 4901-1-05(C)

³ 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

that? FirstEnergy had their opportunity to reply when they filed their memorandum contra. Since a surreply is not a permitted filing, FirstEnergy's surreply should be stricken.

FirstEnergy could have requested a waiver to the rules to permit their filing of the surreply.⁴ They declined to afford themselves of this opportunity and yet in opposition to the rules filed the surreply anyway. FirstEnergy's surreply should be stricken.

The PUCO or the Attorney Examiner has the ability to change the rules of these proceedings.⁵ Unfortunately for FirstEnergy, they have not done so. If they had, the surreply might have been permitted. Since they did not change the rules, the surreply is not permitted and should be stricken.

The Commission is permitted to allow further responsive pleadings if good cause is shown⁶. FirstEnergy raises three arguments on whether good cause exists: (1) neither OCC nor Movants have shown prejudice; (2) its filing has not delayed this proceeding and; (3) important procedural concerns should be considered.⁷ FirstEnergy has failed to satisfy the standard of "good cause."

Movants will be prejudiced if the surreply is allowed. Rules are established in litigation and administrative hearings that permit the moving party to have the last word.

provide the opportunity for a party to file a surreply to a memorandum contra" and disregarded CEI's surreply).

⁴ 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.

⁵ See Ohio Admin. Code 4901-1-38(B).

⁶ Id.

⁷ See surreply at 3-4.

This time-honored tradition is one of the bedrocks of our legal system. In the surreply, FirstEnergy desperately attempts to provide analysis on why Movants should not participate in this matter. Denying Movants the right to participate is the ultimate in prejudice. FirstEnergy filed their Memo Contra late and filed their surreply without permission. Rejecting those filings ensures the Movants participation in this matter. The Commission should not reward FirstEnergy for their poor behavior and should strike their surreply.

FirstEnergy also argues that the service of Movants' Motion to Intervene caused their late filing. FirstEnergy has decades of experience in the realm of the PUCO. They are intimate familiar with the rules and regulations of the PUCO. The fact that they filed their memo contra late and filed their surreply without permission is not the fault of Movants. FirstEnergy's clear disregard for the rules should not be rewarded and their surreply should be stricken.

FirstEnergy's final argument reiterates their position that allowing Movants to participate in this matter will cause "serious problems" with the discovery, evidence and settlement discussions.⁸ FirstEnergy has already demonstrated a conscious disregard for the Movants when they misled the OCC and PUCO when asking for a rate increase. They have demonstrated a conscious disregard for the rules of the Commission. It appears that the only serious problems in this matter are those caused by FirstEnergy.

FirstEnergy filed a pleading without the permission of this Commission and they fail to demonstrate good cause. FirstEnergy's surreply should be stricken so that Movants are not prejudiced by its filing.

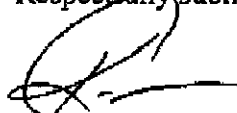
⁸ Surreply at 4.

III. CONCLUSION

The Ohio Administrative Code does not allow FirstEnergy's surreply. This Commission has not waived its rules to allow the filing. These rules are clear and straightforward.

For the reasons set forth above, Movants' 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 foregoing Motion to Strike was served upon the following parties of record this 16th day of July 2010 via first class US mail, postage prepaid.


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