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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 Edison Company for Approval of a New Rider and Revision of an Existing Rider.	**Case No. 10-176-EL-ATA**

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA MOTIONS TO STRIKE FIRSTENERGY'S SURREPLY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND BY SUE STEIGERWALD, CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE, JOAN HEGINBOTHAM AND BOB SCHMITT HOMES, INC.

James W. Burk (0043808)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

ATTORNEYS FOR APPLICANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

On June 17, 2010, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("Companies") filed a Memorandum Contra the Motion to Intervene of Sue Steigerwald, "Citizens for Keeping the All-Electric Promise," Joan Heginbotham and Bob Schmitt Homes, Inc. ("Intervention Movants"). The Office of the Ohio Consumers' Counsel ("OCC") filed a Reply on June 24, 2010, and Intervention Movants filed a Reply the next day. In both Replies, those parties objected to the timeliness of the Companies' Memorandum Contra. On June 30, 2010, the Companies filed a Surreply responding to those timeliness arguments.

Now, OCC and Intervention Movants ask the Commission to strike the Surreply, offering various complaints about procedure (just as they did in opposing the Companies' Memorandum Contra). (*See* OCC Mot. to Strike dated July 16, 2010, pp. 2-5; Intervention Movants' Mot. to Strike dated July 16, 2010, pp. 2-3; *see also* OCC Reply dated June 24, 2010, pp. 2-3; Intervention Movants' Reply dated June 25, 2010, pp. 1-2.) In fact, the Motions to Strike themselves demonstrate the perils of procedural gamesmanship. Rather than see the instant Motion to Intervene decided on its merits, OCC and Intervention Movants would have the Commission decide it on a procedural technicality, all while denying the Companies an opportunity to respond. In doing so, those parties point to no prejudice warranting this result. The Commission should reject this tactic. The Companies should be allowed to respond to the arguments raised for the first time in OCC's and Intervention Movants' Replies, and the Commission should consider the Companies' Surreply and deny the Motions to Strike.

II. ARGUMENT

A. The Commission Should Consider The Companies' Surreply In Evaluating The Motion to Intervene.

OCC and Intervention Movants complain that there is no good cause for the Commission to consider the Companies' Surreply. (*See* OCC Mot. to Strike, p. 3; Intervention Movants' Mot. to Strike, pp. 3-4.) This is not so. In their Replies, OCC and Intervention Movants asked the Commission to disregard the Companies' Memorandum Contra, alleging that the filing was untimely and prejudicial. (*See* OCC Reply, pp. 2-3; Intervention Movants' Reply, pp. 1-2.) No party, however, filed a motion to strike the Memorandum Contra. Given this, the only way the Companies could respond to OCC's and Intervention Movants' timeliness arguments was by filing a Surreply. (*See* Surreply, pp. 2-4.) And contrary to Intervention Movants' contention, the Companies could not have addressed those arguments in the Memorandum Contra because those arguments were not made until after the Companies had submitted that filing. (*See* Intervention Movants' Mot. to Strike, p. 3.) The Surreply was the proper (and only) way to address them.

Further, there is good cause for the Commission to accept the Surreply. *See* Rule 4901-1-38(B) (allowing waiver of Commission rules for "good cause shown"). With it, the Commission will have the full benefit of the parties' arguments and explanations in considering the Motion to Intervene. But by striking it (and, as OCC and Intervention Movants also request, by disregarding the Companies' Memorandum Contra), the Commission will be left with only the arguments of OCC and Intervention Movants. Having objected to the Companies' Memorandum Contra on timeliness grounds, those parties now seek to deprive the Companies of a chance to respond to those new arguments. (*See* OCC Mot. to Strike, p. 3; Intervention Movants' Mot. to Strike, p. 5.) This tactic should be rejected, and the Commission should allow the Surreply. *See In re Joint App. of Ohio-Am. Water Co. and Ohio Suburban Water Co. for*

Approval of the Sale of Ohio Suburban Water Co. Common Stock to Ohio-Am. Water Co. ("*Ohio-Am. Water Co.*"), No. 93-366-WW-UNC, Finding and Order dated July 22, 1993, ¶¶ 7, 8, 10, 15 (denying motion to strike surreply, which opposed motion to intervene, where parties were thus permitted an equal number of filings).

This is especially true since, in its Motion to Strike, OCC makes claims that are flatly contradicted in the Surreply. OCC contends that "the Company failed to argue that it did not receive the [Motion to Intervene] in a timely fashion." (OCC Mot. to Strike, p. 5.) But that is not true. The Companies specifically stated that they did not receive the Motion to Intervene until June 2, 2010, the same day the document was filed, and six days after it apparently was served. (Surreply, p. 2.) Neither OCC nor Intervention Movants allege otherwise. And contrary to OCC's contention, the six-day delay caused confusion regarding when the Motion to Intervene actually was served, thereby altering the calculation of when the Memorandum Contra was due. (*See id.* at 1 n.1; *see also* OCC Mot. to Strike, p. 5 (wrongly alleging that Surreply fails to explain timing of Memorandum Contra).) Given OCC's erroneous claims, the Companies' responsive Surreply should be permitted.

B. OCC And Intervention Movants Fail To Show Prejudice From The Companies' Surreply.

OCC and Intervention Movants have failed to show—and cannot show—any prejudice arising from the Surreply, in which the Companies merely respond to the new timeliness arguments. Although Intervention Movants again argue that they are prejudiced by the Companies' opposition to their intervention, that is not "prejudice" resulting from the filing of the Surreply itself. (*See* Surreply, pp. 3-4; *see also* Intervention Movants' Mot. to Strike, p. 4.) That the Companies oppose intervention is not grounds for excluding the Surreply, where the filing itself did not prevent Intervention Movants from developing their arguments or otherwise

prejudice any party. *See, e.g., In re App. of DEO for Authority to Increase Rates*, Case Nos. 07-829-GA-AIR, *et al.*, Entry on Reh'g dated Sept. 23, 2009, ¶ 13; *In re App. of Duke Energy Retail Sales for Certification as CRES Provider*, Case No. 04-1323-EL-CRS, Entry dated Dec. 3, 2008, ¶¶ 10-11; *Ohio-Am. Water Co.*, Finding and Order dated July 22, 1993, ¶¶ 7, 8, 10, 15.

The only other alleged "prejudice" identified by OCC and Intervention Movants is that the Companies allegedly will have the "last word" on the merits of the proposed intervention. This argument also fails. Neither OCC nor Intervention Movants cite authority for the proposition that the moving party must always be permitted the final filing regarding a motion. (*See* OCC Mot. to Strike, pp. 3-4; Intervention Movants' Mot. to Strike, pp. 3-4.) Moreover, the Companies' Surreply is not the "last word" on intervention. It does not speak to the merits of the Motion to Intervene at all, and it includes no substantive arguments (much less new ones) regarding whether intervention should be allowed. Instead, the Surreply addresses only OCC's and Intervention Movants' arguments regarding the timeliness of the Memorandum Contra. (*See* Surreply, pp. 1-4.) Although those parties complain that the Companies "once again" argue the merits, the portion of Surreply they cite consists only of a single sentence referring to the Companies' arguments in its Memorandum Contra, and OCC and Intervention Movants had ample opportunity to address those arguments in their Replies. (*See id.* at 4.) The Surreply is merely a response to the new timeliness arguments, and the Commission should accept it as such.

C. The Companies Properly Served The Surreply On Intervention Movants.

Intervention Movants, offering yet another procedural objection, also complain that they never received mail service of the Companies' Surreply and that the Surreply thus should be stricken. (*See* Intervention Movants' Mot. to Strike, p. 2.) This is wrong. As shown on the certificate of service for that filing, the Companies served the Surreply on Intervention Movants

(and all other parties) by first class mail and e-mail on June 30, 2010. (*See* Surreply, p. 6.) It is unclear why Intervention Movants apparently did not receive the mailed copy.[1]

In any case, Intervention Movants' objection is no reason to strike the Surreply. They acknowledge that the Companies served them with the Surreply by e-mail on the day it was filed. (*See* Intervention Movants' Mot. to Strike, p. 2.) Intervention Movants thus received the Surreply days earlier than they otherwise would had it been served by mail alone. Moreover, Intervention Movants allege no argument they were hindered in making, no research they could not conduct, no fact they could not discover and no other prejudice resulting from their apparent receipt of only an e-mailed copy. Nor could they—by their own admission, Intervention Movants had the Surreply in hand on the very day it was filed. The Commission should reject this additional procedural complaint.[2]

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission accept and consider the Companies' Surreply and deny OCC's and Intervention Movants' Motions to Strike.

[1] Given the apparent problems experienced by the Companies and Intervention Movants in receiving hard copies of filings served by mail, the Commission should consider ordering electronic service of filings in this case.

[2] In fact, the filing of Intervention Movants' Motion to Strike is itself defective under the Commission's rules. Rule 4901-1-02 (B), which governs the filing of documents by facsimile, requires that "[i]f a document is filed via facsimile transmission, the party must make arrangements for the original signed document and the required number of copies of the pleading to be delivered to the commission no later than the next business day." Rule 4901-1-02(B)(8). The Commission's online docket in this case indicates that Intervention Movants filed their Motion to Strike only by facsimile, without ever submitting the "original signed document" in hard copy as required by that Rule. In fact, Intervention Movants have made a practice of submitting documents only by facsimile, in violation of the Rule. (*See* Intervention Movants' Reply dated June 25, 2010 (docket indicates that only faxed copy was received by Docketing Division).)

DATED: August 2, 2010

Respectfully submitted,

James W. Burk
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

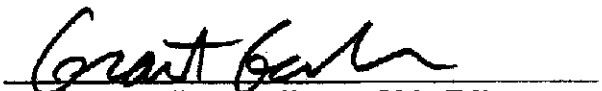
David A. Kutik
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

ATTORNEYS FOR APPLICANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Contra Motions to Strike FirstEnergy's Surreply By The Office of the Ohio Consumers' Counsel And By Sue Steigerwald, Citizens for Keeping the All-Electric Promise, Joan Heginbotham and Bob Schmitt Homes, Inc. was delivered to the following persons by first class mail, postage prepaid, and e-mail this 2nd day of August, 2010:



An Attorney For Applicants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

Jeffrey L. Small
Maureen Grady
Christopher Allwein
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

Samuel C. Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Duane W. Luckey
Thomas McNamee
William L. Wright
Public Utilities Section
Office of the Attorney General
180 E. Broad St., 6th Floor
Columbus, Ohio 43215
duane.luckey@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
william.wright@puc.state.oh.us

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Kevin Corcoran
Corcoran & Associates, Co., LPA
8501 Woodbridge Court
North Ridgeville, Ohio 44039
kevinocorcoran@yahoo.com