

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

DEC 28 PM 4:06

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.)

PUCO

**MOTION TO QUASH FIRSTENERGY'S SUBPOENA
AND MEMORANDUM CONTRA MOTION FOR ISSUANCE OF A SUBPOENA
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility consumers of the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company ("FirstEnergy EDUs" or the "Companies"), moves¹ the Public Utilities Commission of Ohio ("PUCO" or "Commission") to quash any subpoena issued to Mr. Tom Logan as the result of a Motion for Issuance of Subpoena ("Motion for Issuance") filed by the Companies on December 22, 2010. The Companies have forgone their opportunity to challenge the authenticity of the document that is the topic of their Motion for Issuance, and Mr. Logan (who was a witness at the Strongsville hearing) should not be troubled or further inconvenienced as the result of the Companies' untimely response to the events in Strongsville. The Companies' pleading and subpoena are also defective, and should not be relied upon as the basis for the

¹ See Ohio Adm. Code 4901-1-12 and 4901-1-23.

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
Technician Su Date Processed DEC 28 2010

issuance of a subpoena to Mr. Logan. This pleading also serves as the OCC's
Memorandum Contra Motion for Issuance of a Subpoena.²

The reasons supporting this Motion to Quash Subpoena are set forth in the
attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record
Maureen R. Grady
Christopher J. Allwein
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

² Ohio Adm. Code 4901-1-12.

**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.)

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA
AND
MEMORANDUM CONTRA MOTION TO ISSUE SUBPOENA**

I. BACKGROUND

On February 12, 2010, the Companies filed an application to adjust certain residential electric rates which apply to some of the Companies' approximately 1.9 million residential customers, commonly referred to as "all electric" customers. In response to the "substantial public concern expressed" regarding certain all-electric residential customers' bills, and in response to the Companies' application, the Commission ordered rate relief, in the form of residential generation credits, for some of the all-electric customers of the Companies.³ The rate relief was structured to place these all-electric customers in the same position that they would have been in as of December 31, 2008.⁴

³ *In re FirstEnergy's Application for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Finding and Order at ¶9 (March 3, 2010).

⁴ *Id.* at ¶10.

The Commission advised that the rate relief was an interim and not long-term solution to the issue.⁵ The Commission directed its Staff to investigate and file a report regarding the appropriate long-term rates that should be provided to the all-electric residential customers.⁶ The Commission also scheduled and conducted six local public hearings, stating in its Entry on that subject that the Commission was “particularly interested in receiving more information . . . about the following: Commitments: If you are in an all-electric home, what contacts or written documents do you have regarding your electric rates now and in the future? Was there a commitment that the rate would remain with the home for future owners?”⁷

Local public hearings followed the Commission’s Entry on the subject, including a hearing in Strongsville, Ohio on October 27, 2010. Mr. Thomas Logan appeared and testified at the Strongsville hearing, making statements and also offering a letter (with accompanying attachments, the “Letter”) on Ohio Edison’s letterhead dated June 18, 1988. OCC counsel asked that the documents presented by Mr. Logan be marked as Strongsville Ex. 2 and moved for their admission into evidence. No other counsel questioned Mr. Logan or made any statement in connection with his testimony.

⁵ Id. at ¶12.

⁶ Id.

⁷ Id., Entry at 3, ¶(7) (October 14, 2010).

II. ARGUMENT

A. The Motion for Issuance is Defective, Is Unreasonable and Oppressive, and Should be Quashed.

Many elements of the Commission's rules regarding subpoenas, stated in Ohio Adm. Code 4901-1-25, were not followed by FirstEnergy in its Motion for Issuance. A subpoena may be issued "upon motion of any party."⁸ Motions are the subject of Ohio Adm. Code 4901-1-12, which requires motions to be "accompanied by a memorandum in support" that "contains a brief statement of the grounds for the motion and citations of any authorities relied upon."⁹ The Companies' Motion for Issuance is missing the required memorandum in support. The FirstEnergy EDUs do not provide the basis for their assertion that the authenticity of the Letter provided by Mr. Logan is questionable.¹⁰ Neither do the Companies explain the purpose served by their requested subpoena under circumstances where counsel for the FirstEnergy EDUs made no effort at the hearing conducted in Strongsville to question Mr. Logan or to challenge the authenticity of the document provided by Mr. Logan.

Subpoenas "command the person to whom it is directed to attend and give testimony at the time and place specified therein" and may "also command such person to produce . . . documents . . . described therein."¹¹ The subpoena drafted by the FirstEnergy EDUs and attached to the Motion for Issuance does not mention any

⁸ Ohio Adm. Code 4901-1-25(A).

⁹ Ohio Adm. Code 4901-1-12(A).

¹⁰ The Motion for Issuance and its accompanying attachments is misleading. Exhibit C, attached to the Motion for Issuance, does not contain the full contents of the Letter (i.e. as the letter and its attachments were presented by Mr. Logan at the Strongsville hearing).

¹¹ Ohio Adm. Code 4901-1-25(A).

testimony or any time for the deposition at which the Letter should be produced.¹²

Instead, the Companies' subpoena appears to require Mr. Logan to send his Letter to a specified person in Independence, Ohio -- a command that Mr. Logan give up his personal property rather than take his Letter to a deposition for inspection and possible copying.¹³ The FirstEnergy EDUs have not provided for a deposition, and do not provide any basis in law for taking Mr. Logan's personal possession from him.¹⁴ FirstEnergy's demand is unreasonable and oppressive, as provided in Ohio Adm. Code 4901-1-25(C), and should be quashed.

Ohio Adm. Code 4901-1-25(G) provides for legal action against a "person [who] fails to obey a subpoena issued by . . . an attorney examiner . . .," but the subpoena drafted by the FirstEnergy EDUs is confusing. The Motion for Continuance and its accompanying subpoena -- which do not provide the clarity that might be provided if they complied with the Commission's rules¹⁵ -- is intended to be served upon Mr. Logan who is not an attorney. The possibility of legal action against Mr. Logan for failure to comply with the Companies' confusing demand is unreasonable and oppressive, and Mr. Logan should not be expected to comply with the subpoena unless and until clarity is provided

¹² Although the Companies used a subpoena form provided by the Commission, the form was modified such that it no longer serves the purposes and the requirements stated in the Commission's rules. Motion to Issuance, attached subpoena (crossed out sections).

¹³ The Companies' demand that Mr. Logan give them his original Letter is inferred by their dissatisfaction with the copy that is contained in the record from the hearing in Strongsville. Ordinarily, no deposition is required when a party is interested in a document, and providing a copy suffices to satisfy the inquiring party.

¹⁴ The FirstEnergy EDUs failed to submit a memorandum in support of their Motion for Issuance, and therefore failed to submit any citation to legal authority in support of its apparent demand that Mr. Logan hand over his personal property to the Companies.

¹⁵ The non-conforming Motion for Continuance and its non-conforming subpoena are confusing for everyone concerned with this proceeding, including legal counsel for parties.

regarding the subpoena and the FirstEnergy EDUs explain the purpose of their subpoena. The existing subpoena should be quashed.

The Commission also requires that “[a]fter the subpoena is signed, a copy of the motion for a subpoena and a copy of the *signed subpoena* shall then be docketed and served upon the parties to the case.”¹⁶ The copy docketed (and also served upon the OCC) is not signed. The rule requires the FirstEnergy EDUs to provide parties such as the OCC with notice of the steps taken to subpoena a witness, a requirement that was not satisfied when the Companies’ docketed and served an *unsigned* version of the subpoena that accompanied their Motion for Issuance.¹⁷ Proper notice would provide parties a greater opportunity to take action in response to the issuance of a subpoena, such as undertaken herein by the OCC to quash the subpoena.¹⁸ The Companies’ did not comply with the Commission’s rules regarding subpoenas, which is unfair to parties such as the OCC as well as to Mr. Logan. The subpoena should be quashed.

B. The Companies’ Challenge to the Authenticity of the Logan Letter is Untimely and Therefore Purposeless.

Objections as to a document’s form and the reliability of the information contained therein should be heard when the document is presented and in the presence of the person who submits the document so that inquiry may be made of that person regarding the document’s background. Mr. Logan appeared and presented the Letter at the Strongsville hearing.¹⁹ Supported by the contents of the Letter, Mr. Logan testified --

¹⁶ Ohio Adm. Code 4901-1-25(A) (emphasis supplied).

¹⁷ The OCC learned that the subpoena was signed in a telephone call to the Attorney Examiner.

¹⁸ Notice is especially important under circumstances where the FirstEnergy EDUs filed their Motion for Issuance during a holiday period, giving Mr. Logan and parties to the case little time before the date stated in the subpoena for action by Mr. Logan.

¹⁹ Strongsville Tr. at 125-126 (October 27, 2010).

under oath -- that the document was "issued by an authorized Ohio Edison employee that shows that Ohio Edison did enter into a permanent, fixed rate agreement with me as an all-electric homeowner."²⁰ OCC counsel marked the Letter and moved for its admission as evidence in this proceeding.²¹ Counsel for the Companies had the opportunity to inspect all documents that were marked at the local public hearings and that were subject to the OCC's motions for admission.²² The Companies should have dealt with any challenge that it may have had to the information presented by Mr. Logan while the witness was available in Strongsville.²³

Counsel for the Companies had the opportunity to cross-examine Mr. Logan and make any objection that the Companies had regarding the authenticity and reliability of the documents that Mr. Logan presented. The Companies' inquiries and/or objections might also have alerted the Attorney Examiner and counsel for other parties regarding inquiries they deemed necessary regarding the Letter while Mr. Logan was available to respond to questions.²⁴ The Companies' counsel did not make inquiries of Mr. Logan,

²⁰ Id. at 125.

²¹ Id. at 127.

²² See, e.g., Sandusky Tr. at 60-61 (October 25, 2010). The procedures set forth at the Sandusky hearing were the basis for the remainder of the local public hearings. See, e.g., Strongsville Tr. at 65 ("Consistent with the procedure that was worked out in the Sandusky hearing . . .").

²³ There was no element of surprise in the testimony presented by Mr. Logan. In fact, a copy of the letter sent to Mr. Logan appeared in the link to an article published by a major Cleveland newspaper. The article from the Plain Dealer is available at:

http://www.cleveland.com/business/index.ssf/2010/03/firstenergy_gave_builders_cash.html

and the letter from the Ohio Edison employee was linked to the article, available at:

http://media.cleveland.com/business_impact/other/heatpump.pdf

²⁴ The availability of witnesses to testify, and the possible abuse of persons testifying at local public hearings by requiring their additional presence in Columbus during a later hearing, was a concern expressed by OCC counsel. See, e.g., Strongsville Tr. at 65-66 (October 27, 2010). FirstEnergy was given its opportunity to examine the witnesses without forcing their presence in Columbus. Id.

and the challenge regarding the Letter is untimely and therefore without purpose. This again supports the OCC's Motion to Quash Subpoena.

The Companies' counsel remained silent at Strongsville regarding Mr. Logan's testimony, providing the FirstEnergy EDUs the opportunity to argue later regarding only other objections (i.e. arguments such as the relevance of information for which the presence of the witness would not be informative). This best use of live witnesses and an appropriate location for legal argument (i.e. at the Columbus hearing, thereby reserving time at the local public hearings for public testimony) was discussed further and confirmed at the status conference conducted on November 18, 2010. The Companies' apparent desire to eliminate the contents of the Letter from the evidentiary record -- revealed by the Motion for Issuance that seeks to inquire into the authenticity of the Letter²⁵ -- is untimely. Its purpose being otherwise unexplained, the subpoena sought to be issued by the Motion for Issuance should be quashed.

III. CONCLUSION

The OCC's Motion to Quash Subpoena should be granted, pursuant to Ohio Adm. Code 4901-1-25(C) as applied to the circumstances described above. Also, this pleading constitutes the OCC's Memorandum Contra Motion for Issuance of a Subpoena whereby the OCC explains how the Companies failed to meet the Commission's requirements for seeking a subpoena.

The Companies Motion for Issuance and the subpoena drafted by the FirstEnergy EDUs are defective and confusing as well as unreasonable and oppressive. FirstEnergy has not explained the purpose served by its subpoena since any challenge to the

²⁵ Motion for Issuance at 1.

authenticity of the Letter presented by Mr. Logan is untimely. The only purpose served by the subpoena is to oppress a witness who responded to the Commission's call for information regarding the Companies' promises to its customers.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

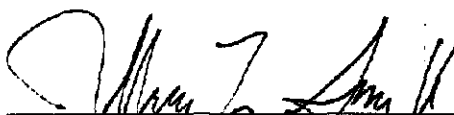


Jeffrey L. Small, Counsel of Record
Maureen R. Grady
Christopher J. Allwein
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Quash and Memorandum Contra Motion for Issuance by the Office of the Ohio Consumers' Counsel was provided to the persons listed below via U.S. Mail, postage prepaid, this 28th day of December, 2010.



Jeffrey L. Small
Assistant Consumers' Counsel

PERSONS SERVED

John Jones
Attorney General's Office
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215

James W. Burk
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 E. State St., 17th Fl
Columbus, OH 43215

Thomas J. O'Brien
Bricker & Eckler LLP
100 S. Third St
Columbus, OH 43215

**Attorneys for Industrial Energy Users-
Ohio**

**Attorney for Ohio Hospital Association
and Ohio Manufacturers' Association**

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620

Kevin Corcoran
Corcoran & Associates Co., LPA
8501 Woodbridge Court
North Ridgeville, OH 44039

Attorney for Ohio Hospital Association

**Attorney for Sue Steigerwald; Citizens
For Keeping The All-Electric Promise
(CKAP); Joan Heginbotham and Bob
Schmitt Homes, Inc.**

David C. Rinebolt
Colleen L. Mooney
231 West Lima Street
Findlay, OH 45839-1793

**Attorneys for Ohio Partners for
Affordable Energy**

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease
52 East Gay Street
PO Box 1008
Columbus, OH 43216-1008

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Blvd Suite 300
Chicago, IL 60661

**Attorneys for Constellation New Energy,
Inc.**

David A. Kutik
Jones Day
North Point, 901 Lakeside Ave.
Cleveland, OH 44114-1190

**Attorney for Ohio Edison Company,
Cleveland Electric Illuminating
Company and the Toledo Edison
Company**

Grant W. Garber
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017

**Attorney for Ohio Edison Company,
Cleveland Electric Illuminating
Company and the Toledo Edison
Company**

John.jones@puc.state.oh.us
cynthia.a.fonner@constellation.com
smhoward@vorys.com
cmooney2@columbus.rr.com
tobrien@bricker.com
mhpetricoff@vssp.com
drinebolt@aol.com
sam@mwncmh.com
ricks@ohanet.org
kevinocorcoran@yahoo.com
burkj@firstenergycorp.com
dakutik@jonesday.com
gwwgarber@jonesday.com