

**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 Authority to	)	Case No. 12-1230-EL-SSO
Establish a Standard Service Offer	)	
Pursuant to R.C. § 4928.143 in the Form	)	
of an Electric Security Plan.	)	

**MOTION TO STRIKE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves to strike the Memorandum Contra filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy") in response to OCC's July 17, 2012 Motion to Take Administrative Notice. FirstEnergy's Memorandum Contra was filed ten calendar days after the OCC's Motion. But the Public Utilities Commission of Ohio ("PUCO" or "Commission") previously determined that all the parties in this case would have only five days for filing a memorandum contra—meaning FirstEnergy's filing is late.<sup>1</sup>

The reasons the Commission should grant OCC's Motion to Strike are more fully explained in the attached Memorandum in Support.

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<sup>1</sup> See Entry at ¶7 (Apr. 19, 2012).

Respectfully submitted,

BRUCE J. WESTON  
CONSUMERS' COUNSEL

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On April 19, 2012, the Attorney Examiner issued an Entry establishing a procedural schedule for this proceeding. Among other things, the Entry set deadlines for pleadings which required that any memoranda contra to motions be filed within five calendar days after service of such a motion.<sup>2</sup> On July 17, 2012, OCC filed and served a Motion to Take Administrative Notice of certain materials<sup>3</sup> that were part of the record in the Peak Demand Cases, being proceedings closely related to this case.<sup>4</sup> Also, OCC requested in its Application for Rehearing that the Commission take administrative notice of information contained in the Exeter Management Performance Audit Report (“Exeter Report”) and information contained in the Goldberg Schneider Financial Audit (“Financial Audit”) filed in a case where the Commission opened a docket for the

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<sup>2</sup> Id.

<sup>3</sup> The Motion for Administrative Notice was for certain documents filed by FirstEnergy.

<sup>4</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, and 12-2192-EL-POR.

purpose of reviewing FirstEnergy's alternative energy resource costs.<sup>5</sup> On August 27, 2012, FirstEnergy filed a Memorandum Contra OCC's motion, as well as, opposing OCC's request for administrative notice contained in the Application for Rehearing filed by OCC and Citizen Power on August 17, 2012.

## **II. ARGUMENT**

### **A. FirstEnergy's Memorandum Contra Should Be Stricken.**

There are several reasons for striking FirstEnergy's Memorandum Contra. FirstEnergy's Memorandum Contra is not timely. FirstEnergy also fails to show good cause as to why it should be permitted to file a late response to OCC's Motion. In addition, recent Commission precedent should be followed.

First, FirstEnergy's Memorandum Contra was filed five days late. According to the Attorney Examiner's Entry, the Memorandum Contra OCC's Motion was due on or before August 22, 2012. This procedural schedule has been in effect for months, and it has applied to all parties and all pleadings filed in this proceeding.

Second, FirstEnergy offered no explanation as to why it could not comply with the procedural schedule that required the pleading to be filed in five calendar days. In order for a party to file a pleading beyond the allowed period of time, the Commission's Rules require a motion and a demonstration of good cause. Ohio Adm. Code 4901-1-13 (A) states:

Except as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions

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<sup>5</sup> *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Exeter Report and Financial Audit Report (August 15, 2012).

of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, \* \* \*.

FirstEnergy did not include in its pleading a motion for an extension of time nor was there good cause shown for why the Commission should accept and consider FirstEnergy's late pleading. Therefore, the Commission should strike FirstEnergy's late pleading.

Third, this is not the first time that FirstEnergy – or one of its affiliates – disregarded an Attorney Examiner's procedural entry and filed a pleading out of time. Almost the exact same fact pattern existed in the recent American Electric Power ("AEP") electric security plan ("ESP") case ("AEP ESP Case"), in which the Commission granted OCC/Appalachian Peace and Justice Network's ("APJN") Motion to Strike FirstEnergy Solution's Memorandum Contra OCC/APJN's Motion to Take Administrative Notice. The Commission in its August 8, 2012 Opinion and Order stated:

On August 6, 2012, FES also filed a memorandum contra OCC/APJN's motion. On August 7, 2012, OCC/APJN filed a motion to strike FES's memorandum contra. In support of its motion to strike, OCC/APJN argues that FES filed its memorandum contra 17 days after OCC/APJN filed its motion, past the procedural deadlines established by attorney examiner entry issued April 2, 2012. The Commission finds that OCC/APJN's motion to strike FES's memorandum contra OCC/APJN's motion should be granted. By entry issued April 2, 2012, the attorney examiner set an expedited procedural schedule establishing that any memoranda contra be filed within five calendar days after the service of any motions. Therefore, as FES filed its memorandum contra 17 days after OCC/APJN filed its motion, OCC/APJN's motion to strike shall be granted.<sup>6</sup>

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<sup>6</sup> *In the Matter of the application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.* Case No. 11-346-EL-SSO, et al., Opinion and Order at 12 (August 8, 2012).

The facts in this case are virtually identical to the facts in the AEP ESP Case. Therefore, the Commission should follow its recent precedent and strike FirstEnergy's Memorandum Contra for being out of time.

### **III. CONCLUSION**

FirstEnergy's Memorandum Contra should have been filed within five calendar days of the OCC Motion, on or before August 22, 2012. It was not filed until August 27, 2012. It was untimely and FirstEnergy offered no good cause as to why the Commission should consider its late pleading.

The Commission should strike FirstEnergy's Memorandum Contra and grant OCC's Motion to Take Administrative Notice.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Motion to Strike of the Ohio Consumers' Counsel* was served via Electronic Mail upon the following persons on this 30th day of August 2012.

/s/ Larry S. Sauer

Larry S. Sauer  
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Summary: Motion Motion to Strike by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.