

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. 12-1230-EL-SSO  
Edison Company for Authority to Provide for )  
a Standard Service Offer Pursuant to R.C. § )  
4928.143 in the Form of an Electric Security )  
Plan )

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**MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY  
CONTRA MOTION TO STRIKE BY THE OFFICE OF THE OHIO  
CONSUMER'S COUNSEL**

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## I. INTRODUCTION

On August 17, 2012<sup>1</sup>, the Office of the Ohio Consumers' Counsel ("OCC") filed a motion to take administrative notice of various materials outside of the record of this case and from other proceedings currently pending before the Public Utilities Commission of Ohio (the "Commission").<sup>2</sup> On the same day, and presumably pursuant to Rule 4901-1-35, O.A.C., OCC filed its application for rehearing in this matter, thirty days after the Commission issued its July 18 Opinion and Order.<sup>3</sup> On August 27, 2012, and pursuant to the time allotted under Rule 4901-1-35, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's (collectively, the "Companies") filed a memorandum contra several intervenors' applications for rehearing, including OCC's. On the same day, the Companies filed a memorandum contra OCC's motion to take administrative notice (the "Memorandum Contra"). On August 30, 2012, OCC filed both its Motion to Strike (the "Motion") and its Reply Memorandum (the "Reply") regarding the Memorandum Contra.

In its Motion, OCC argues that the filing of the Memorandum Contra was untimely and that consequently it should be stricken. As shown below, OCC's claims are misplaced. OCC misreads the scheduling order issued by the Commission in the instant matter on April 19, 2012.

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<sup>1</sup> In its Motion to Strike, the Office of the Ohio Consumers' Counsel incorrectly states that it filed its Motion to Take Administrative Notice on July 17, 2012.

<sup>2</sup> The OCC has requested that the Commission take administrative notice of various materials from *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 and *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*, Case No. 11-5201-EL-RDR.

<sup>3</sup> In a footnote in its Application for Rehearing without any accompanying motion or memorandum in support, OCC made an additional request that the Commission take administrative notice of the materials from Case No. 11-5201-EL-RDR. See OCC Application for Rehearing, p. 22, n. 72 (Filed: Aug. 17, 2012). While this was clearly not a proper motion for the taking of administrative notice, the Companies nonetheless included a response to this 'request' in their Memorandum Contra.

Further, even if the Companies filed the Memorandum Contra out of time (which they did not), it would only have been one day late (contrary to OCC's claim that the Memorandum Contra was five days late). Because there was no prejudice to OCC (indeed, OCC fails to claim any), OCC's Motion is meritless. The Commission should deny the Motion accordingly.

## **II. ARGUMENT**

### **A. The Companies Complied With The Commission's April 19, 2012 Scheduling Order.**

On April 19, 2012, the Commission entered a scheduling order in the instant proceeding. Therein, the Commission ordered:

*In light of the time frame for preparation for the hearing in this matter, the attorney examiner requires that, in the event that any motion is made in this proceeding, any memoranda contra shall be required to be filed within five business days after the service of such motion....*

Case No. 12-1230-EL-SSO ("FE ESP 3"), Entry, p. 3 (April 19, 2012) ("Scheduling Order") (emphasis added). Thus, the Scheduling Order related to the events up to and including the hearing in this case.

The Scheduling Order is not directed toward the timeliness of any memoranda contra filed after this case was submitted to the Commission and after the Commission had issued its Opinion and Order, including memoranda contra any application for rehearing or motions filed thereafter. After the submission of the case on the record, the Ohio Administrative Code's default rules regarding the timeliness of memoranda contra and other filings – such as Rules 4901-1-35 and 4901-1-12 – should control since the expressed concern about preparation for hearing had long since passed.

OCC attempts to make much of the Commission's recent Opinion and Order in Case No. 11-346-EL-SSO (the "AEP ESP"), in which the Commission struck a memorandum contra as

untimely based upon a prior scheduling order. That decision, however, is clearly distinguishable from the instant matter. To begin, the language of the respective scheduling orders differs significantly. The AEP ESP scheduling order states:

The attorney examiner notes that although it is the Commission's preference to *resolve these proceedings* by June 1, 2012, in light of the complexity of AEP-Ohio's application and the need to assure due process for parties with real and substantial interests in *these proceedings*, the attorney examiner finds it appropriate to set the following procedural schedule.... In light of the time frame *for this proceeding*, the attorney examiner requires that, in the event any motion is made *in these proceedings*, any memorandum contra shall be filed within five *calendar* days after service of such motion . . . .

Case No. 11-346-EL-SSO, Entry, p. 3 (April 2, 2012) (emphasis added). Thus, the Order in the AEP ESP case focused on memoranda contra filed throughout the course of the entire proceeding. In contrast, as noted, the Scheduling Order here with regard to memoranda contra motions clearly focuses on the time period preceding the hearing phase of the case.

Further, in the AEP ESP case, the untimely memoranda contra at issue was filed in response to a motion filed prior to the submission of the case to the Commission on the record. Indeed, the finding of un-timeliness occurred in the Commission's Opinion and Order and not at the time or after the filing of applications for rehearing. Here, the Companies filed their Memorandum Contra in response to a motion after the record had closed and the Opinion and Order had already been issued by the Commission. Therefore, the expressed concern about "the time frame for preparation for hearing" and the need for expedited responses to motions was no longer applicable, and consequently the Commission Rules concerning the timeliness of memoranda contra should control at that point – not the Scheduling Order. Particularly when no harm or prejudice has occurred or been alleged.

The Companies thus filed their Memorandum Contra in a timely fashion. The Commission should deny the OCC's Motion.

**B. Even if the Companies Did File Their Memorandum Contra Out of Time, Because There Was No Prejudice To OCC, The Memorandum Contra Should Not Be Stricken.**

Even if the Scheduling Order applied to the Memorandum Contra, the Companies' Memorandum Contra was only one day late. The Scheduling Order calls for filing memoranda contra within five business days. Five business days from August 17, 2012 would be August 24, 2012. The Companies filed their Memorandum Contra on the very next business day, August 27, 2012.

In its Motion, OCC erroneously claims that the Companies filed their Memorandum Contra five days out of time. *See* Motion p. 2. Contrary to the plain language of the Scheduling Order, in its Motion and Reply OCC repeatedly, and wrongly, states that the Scheduling Order sets a five-calendar-day response time for memoranda contra.<sup>4</sup> *See* Motion, pp. 1, 2, 4; Reply, p. 1.

Given that the Companies were, at most, one day late, there is no basis to strike the Memorandum Contra. Indeed, in the absence of a showing of prejudice, the Commission, has routinely accepted filings that were one day out of time (or even later). *See, e.g., In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, 2012 Ohio PUC LEXIS 359, \*3-5 (April 13, 2012) (permitting filing of direct testimony one day out of time in the absence of prejudice); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric*

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<sup>4</sup> Five calendar days from August 17, 2012 would be August 22, 2012, five days prior to August 27.

*Security Plan*, Case No. 11-3549-EL-SSO, 2011 Ohio PUC LEXIS 889, \*6-7 (July 22, 2011) (granting motion to intervene several days out of time because no prejudice to party opposing intervention resulted); *In the Matter of the Petition of the Indian Lake Area Chamber of Commerce and numerous other subscribers of the Russells Point Exchange of United Telephone Company of Ohio, Complainants, v. United Telephone Company of Ohio, Respondent, Relative to a Request for Two-Way, Nonoptional Extended Area Service Between the Russells Point Exchange and the Bellefontaine Exchange of United Telephone Company of Ohio*, 89-1485-TP-PEX, 1990 Ohio PUC LEXIS 181, \*3 (Feb. 21, 1990) (permitting filing of memorandum contra one day out of time because “the filing substantially complied with the Commission’s requirements”). Indeed, in this proceeding the Commission granted an out-of-time intervention for the Cleveland Municipal Schools District. *See* Entry, May 15, 2012, p. 2.

Nowhere in its Motion or in its Reply does OCC show, or even mention, that the alleged delayed filing of the Companies’ Memorandum Contra somehow prejudiced OCC. The sole basis for OCC’s Motion is that the Companies allegedly filed their Memorandum Contra late, full stop. OCC’s argument here – that something was late and therefore should be stricken, even if it didn’t prejudice anybody – has been rejected before. In *In the Matter of the Application of Duke Energy Retail Sales, LLC, for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 04-1323-EL-CRS, 2008 Ohio PUC LEXIS 732 (Dec. 3, 2008), a case on all fours with the instant matter, OCC filed a motion to strike the utility’s memorandum contra because it was filed one day out of time. The Commission denied OCC’s motion and granted the utility a one-day extension so that the memorandum contra could be considered timely as filed. *Id.* at \*15. The Commission agreed with the utility that no prejudice had resulted to OCC, especially since OCC filed a substantive reply to the utility’s memorandum

contra. *Id.* Specifically, the Commission found “the memorandum contra was only one day late and OCC did file its substantive reply to [the utility’s] memorandum contra” and consequently the Commission ruled against OCC. *Id.* at p. \*14-15.

Likewise, in the instant matter, OCC has made no claim, much less a showing, of any prejudice whatsoever redounding to OCC because the Companies were allegedly one day late in filing. In fact, OCC’s actions immediately subsequent to its filing of its Motion belie any putative claim of prejudice. Within hours of filing its Motion, OCC filed an eight-page reply memorandum. Even if the Companies did file their Memorandum Contra one day late, which they did not, OCC was not prejudiced by any such alleged lack of timeliness. The lack of prejudice here dooms OCC’s Motion. Any argument to the contrary is baseless.

### III. CONCLUSION

For the reasons set forth above, the Companies respectfully request that the Commission deny OCC's Motion to Strike. To the extent that the Commission finds that the Companies filed their Memorandum Contra late, the Companies respectfully request that the Commission waive the Scheduling Order regarding the due date for the Memorandum Contra or grant the Companies a one-day extension of the filing date for the Memorandum Contra.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was sent to the following by e-mail this 4th day of September, 2012:

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Summary: Memorandum Contra Motion to Strike By The Office Of The Ohio Consumers' Counsel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company