

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Long-Term Forecast)
Report of Ohio Power Company and)
Related Matters.) Case No. 10-501-EL-FOR

In the Matter of the Long-Term Forecast)
Report of Columbus Southern Power)
Company and Related Matters.) Case No. 10-502-EL-FOR

**FIRSTENERGY SOLUTIONS CORP. MOTION TO STRIKE REPLY BRIEF OF
UNIVERSITY OF TOLEDO INNOVATION ENTERPRISES CORPORATION**

FirstEnergy Solutions Corp. (“FES”) opposed the Motion to Intervene of the University of Toledo Innovation Enterprises Corporation (“UTIE”) since it was filed more than a year and a half after the hearing in this case began, failed to identify how UTIE would be adversely affected by these proceedings, and expressly indicated that UTIE intended to introduce new evidence into this proceeding after the evidentiary record had been closed. UTIE’s Reply Brief (the “Reply Brief”) shows why FES opposed UTIE’s Motion. Rather than confining itself to the evidentiary record, UTIE has again attempted to introduce new facts into the evidentiary record. If this were not improper enough, UTIE compounded its error by failing to serve the improper Reply Brief on the parties in accordance with O.A.C. 4901-1-05, showing a lack of understanding or concern for Commission rules.

As discussed in detail in the attached memorandum in support, UTIE’s attempt to introduce new evidence into the evidentiary record via its Reply Brief is improper. UTIE did not appear in this proceeding in time to help create the evidentiary record, and is now

seeking to do on brief what it failed to do at hearing. This is inappropriate, and UTIE's Reply Brief should be stricken from the record.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.
MOTION TO STRIKE REPLY BRIEF OF UNIVERSITY OF TOLEDO
INNOVATION ENTERPRISES CORPORATION**

I. INTRODUCTION

As explained by FES in its Memorandum in Opposition to UTIE's Motion to Intervene, it would be extremely prejudicial for UTIE to add facts to the evidentiary record after briefing has concluded. Rather than acknowledging this self-evident fact, or finding evidentiary support in the existing record for its arguments, UTIE has attempted to introduce new facts into the evidentiary record yet again via its Reply Brief. Literally every substantive point raised by UTIE is accompanied by a new factual assertion, including three new exhibits which UTIE claims support its new facts. This is improper not only because this is a reply brief which should be limited to issues raised in the initial Motion to Intervene, but also because the hearing in this case is over and the parties are limited to the record created at that hearing. Pursuant to Rules 4901-1-12 and 4901-1-27 of the Ohio Administrative Code, UTIE's Reply Brief should be stricken from the record.

As an additional justification for striking UTIE's Reply Brief, UTIE has (again) failed to serve the Reply Brief on the parties in accordance with O.A.C. 4901-1-05. All parties to Commission proceedings are expected to comply with the Commission's rules

on electronic service, and UTIE's failure to do so is yet another reason to strike UTIE's Reply Brief.

II. ARGUMENT

A. UTIE's Reply Brief Should Be Stricken From The Record Because It Constitutes Another Inappropriate Attempt To Add Evidence Into The Evidentiary Record.

FES opposed UTIE's Motion to Intervene because, among other reasons, UTIE is attempting to introduce new evidence into the evidentiary record after the hearing in this case has concluded. FES presented evidence showing that UTIE's claims regarding the impact of Turning Point were the subject of legitimate question by the parties, and established that it would be improper to allow UTIE to introduce this evidence on brief when the other parties to this proceeding would not have the opportunity to have those questions answered by UTIE.

Despite the fact that FES specifically raised this issue in its memorandum in opposition, UTIE's Reply Brief is littered with new factual assertions which appear nowhere in the evidentiary record or in UTIE's Motion to Intervene. By way of example, UTIE claims that it "is at the forefront of solar technology in Ohio in terms of education, research and development, and commercialization."¹ UTIE then attaches a website article in support of its claim that "UTIE will be directly impacted by the Commission's decision regarding [Turning Point]."²

This representative example is exactly why FES objected to UTIE's intervention. There is no evidence in the record that UTIE is actually "at the forefront" of solar technology, yet UTIE seeks to have this established on brief in order to lend additional

¹ UTIE Reply Brief, p. 2.

² UTIE Reply Brief, p. 2.

weight to its comments. There is no record evidence regarding the alleged signed “collaboration agreement” between UTIE and Isofoton, yet UTIE claims (for the first time on reply brief) that it will be directly affected by Turning Point as the result of this agreement. The other parties to this proceeding are then left in the impossible position of being unable to examine these claims. They are also unable to determine if UTIE has any financial incentive, through the “collaboration agreement” or otherwise, to advocate for Turning Point or for AEP Ohio’s plan to proceed with Turning Point without the alleged solar “need” for AEP Ohio being put up for competitive bid. These are only a few of the questions that the other parties may wish to ask UTIE if this evidence was presented at hearing, but are unable to because UTIE is seeking to introduce new facts on brief rather than at hearing. This is both unfair and prejudicial, and should not be tolerated by the Commission.

The alleged “collaboration agreement” and accompanying website article are not the only instances of new facts being introduced into the record in this brief. UTIE also claims that it is: “directly tied to the growth of solar power in northwest Ohio;”³ that “the full operational capacity for the new Isofoton facility is contingent upon approval of [Turning Point];”⁴ attaches a letter from Isofoton which is not in the evidentiary record or the case docket to claim that Isofoton’s expansion plans are contingent on Turning Point;⁵ and a newspaper article claiming the same.⁶ As UTIE’s Reply Brief is

³ UTIE Reply Brief, p. 2.

⁴ UTIE Reply Brief, p. 3.

⁵ UTIE Reply Brief, p. 3, Ex. 2.

⁶ UTIE Reply Brief, p. 3, Ex. 3.

completely filled with new factual allegations, it should be stricken from the record as a whole.

Finally, despite the new factual claims in the Reply Brief UTIE claims that it “has no intention of supplementing the record” and that it adds the new evidence in its Reply Brief only to respond to the points raised by FES.⁷ This shows that UTIE fails to understand the problem. FES cited non-record evidence in order to show that there are legitimate questions about UTIE’s claims concerning the impact of Turning Point, and that it would be unfair to allow this evidence into the record when FES is prohibited from raising these questions at hearing. UTIE has responded by attempting to prove up these claims for the first time in the Reply Brief, seeking to conclusively establish the impact that Turning Point will have on Isofoton and the local economy on brief rather than at hearing. There is a significant difference between using non-record evidence to show the dangers of putting facts into evidence via brief (what FES did), and using non-record evidence to provide support for a party’s ultimate position in a case (what UTIE is attempting to do).

Despite UTIE’s claims to the contrary, UTIE has made clear that it is attempting to establish non-record facts on brief in this case in order to establish a “need” for Turning Point. UTIE’s Reply Brief should be accordingly stricken from the record.

B. UTIE Failed To Comply With The Commission’s Rules Regarding Service.

Litigants before the Commission are required to appropriately serve all pleadings. O.A.C. 4901-1-05(A) requires that all papers filed with the Commission be accompanied by a certificate of service. For electronic service, the serving party is required to “include

⁷ UTIE Reply Brief, fn. 1, p. 4.

the e-mail address of the person to whom the document was sent.”⁸ O.A.C. 4901-1-05(C)(4) provides additional guidance, making clear that all documents are to be emailed to opposing counsel by the filing party and that a record of that email be kept through any appeal period.

Rather than complying with this basic standard of Commission practice, UTIE has again⁹ failed to electronically serve any party with its Reply Brief. Instead, UTIE relies on the Commission’s electronic service system to serve its Reply Brief.¹⁰ Though UTIE claims that it is “better suited than any other party”¹¹ to address the issues raised by the Commission in this case, its repeated failure to abide by the Commission’s service rules should not be tolerated. UTIE’s Reply Brief should be stricken from the record.

III. CONCLUSION

FES respectfully requests that UTIE’s Reply Brief be stricken from the record.

Respectfully submitted,

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⁸ O.A.C. 4901-1-05(A)

⁹ UTIE made the same error in its Motion to Intervene. *See* Motion to Intervene, p. 4.

¹⁰ UTIE Reply Brief, p. 4.

¹¹ UTIE Reply Brief, p. 2.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FIRSTENERGY SOLUTIONS CORP. MOTION TO STRIKE REPLY BRIEF OF UNIVERSITY OF TOLEDO INNOVATION ENTERPRISES CORPORATION* was served this 28th day of September, 2012, via e-mail upon the parties below.

/s/ N. Trevor Alexander
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Summary: Motion to Strike Reply Brief of University of Toledo Innovation Enterprises Corp.
electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.