

**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. 14-1297-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)	

REPLY OF INTERSTATE GAS SUPPLY, INC.

On behalf of Interstate Gas Supply, Inc.

I. INTRODUCTION

Ohio Edison Company, Toledo Edison Company, and Cleveland Electric Illuminating Company (collectively “FirstEnergy”) filed an interlocutory appeal (“appeal”) regarding an Attorney Examiner ruling denying its oral motion to strike portions of the testimony of Interstate Gas Supply, Inc. (“IGS”) witness White. FirstEnergy takes issue with Mr. White White’s reliance on testimony submitted by FirstEnergy’s General Counsel, Leila Vespoli, to the Ohio House of Representatives Public Utilities Committee.

Notably, FirstEnergy does not dispute the validity of Ms. Vespoli’s testimony. Rather, FirstEnergy submits a technical (though incorrect) legal argument, claiming that IGS did not authenticate Ms. Vespoli’s testimony because Mr. White’s prefiled testimony did not include a certified copy. The Commission should deny FirstEnergy’s appeal. The Attorney Examiners denial of FirstEnergy’s motion to strike did not deviate from precedent; thus, the Commission should not certify the appeal. And, even if the Commission certifies the appeal and addresses FirstEnergy’s technical legal argument, it should be rejected out of hand as inconsistent with Ohio law, precedent, and Commission practice. Finally, FirstEnergy has failed to demonstrate prejudice from the ruling.

II. BACKGROUND AND ARGUMENT

In its application to establish an electric security plan (“ESP”), FirstEnergy requests approval of the deceptively named Retail Rate Stability (“RRS”) Rider. Through a Stipulation and Recommendation submitted on December 22, 2014 (“Stipulation”), FirstEnergy and others recommend approval of the RRS.

In this proceeding, the Commission must determine whether the proposed Stipulation satisfies a three prong test, including whether the Stipulation is in the public interest. In its testimony supporting the Stipulation FirstEnergy claims that adoption of the RRS is in the public interest. Subsequently, IGS witness White submitted testimony concluding that the Stipulation—which would approve the subsidization of approximately 3,000 MW of FirstEnergy Solutions’ (“FES”) competitive generation—is not in the public interest. Moreover, in his testimony Mr. White indicated that the Commission need not rely on his word alone; FirstEnergy’s own recent statements articulating the dangers of subsidizing generation in a competitive marketplace may be even more compelling.

Based on the recent statements publicly filed by FirstEnergy at the Ohio House of Representative—statements that are diametrically opposed to several aspects of the application at issue in this proceeding—FirstEnergy has a lot of explaining to do. Specifically, as noted in Mr. White’s testimony (which FirstEnergy now seeks to strike) FirstEnergy’s Chief Legal Officer and Executive Vice President of Markets, filed testimony *on behalf of FirstEnergy*, at the Ohio House of Representatives stating that:

- “The real problem with subsidized generation is that regulators would be picking the “winners” and “losers” in the energy market. We’ve been down that road before, and the results weren’t pretty. For example, in the past our utilities in Pennsylvania and New Jersey were required to purchase power from Non Utility Generators, with contracts extending up to two or three decades. In our Pennsylvania service area alone, customers have paid \$1.5 billion over market prices for this subsidized generation. At a time when Ohio is exploring every opportunity to create jobs and grow our economy, we simply cannot afford similar missteps that would saddle our customers with higher-than-market prices for electricity.”
- “We’re also concerned about any effort to subsidize certain generating facilities. Much of the rhetoric around these efforts involves a misguided notion of Ohio’s energy security – that our state could experience outages if it doesn’t generate as much energy as it consumes. This notion simply

ignores how the electric grid operates, and how competitive markets always secure generation from the lowest-cost sources – no matter where they are located.”

- “Regarding competitive markets for electric generation, we already know that they work because these markets have resulted in lower electric generation prices and less risk for Ohio customers.”
- “Competitive markets for electric generation, instead of utility monopolies, would drive innovation, efficiency and investment – and, most important, deliver the lowest price to customers over time.”
- “But more important, all of our generation-related investments – including the risks that accompany them – are now borne by our shareholders, not by customers.”
- “Since 1999, our competitive subsidiary, FirstEnergy Solutions, has invested nearly \$6.4 billion in its generating fleet while adding more than 900 megawatts of power. That’s the equivalent of a large, baseload power plant – and, once again, we’ve brought that additional capacity online *at no risk to customers*.”
- “Even if Ohio’s energy security were an issue – which it is not – our state imports less electricity today than it did under the previous regulated model, largely due to the significant amount of generation that has been added since competitive markets were established in Ohio. From 2005 to 2009, Ohio imported an average of 10 percent of its total electricity needs, compared with 17 percent in 1990.”
- “Let me offer a final example of the unintended consequences of subsidized generation. FirstEnergy Solutions is currently reviewing a plan to transform an old limestone mine in Norton, Ohio, into a Compressed Air Energy Storage, or CAES, facility However, it is highly unlikely that we would consider moving forward with this project if the plant would have to compete against subsidized generation in Ohio.”

In its appeal, FirstEnergy claims that its motion to strike should be granted because otherwise FirstEnergy “will be forced to spend a substantial amount of resources responding to the arguments” in Mr. White’s testimony. FirstEnergy Appeal at 11. But, FirstEnergy’s complaint that it will have to commit substantial resources to “respond” is not a basis for granting its motion. If anything, FirstEnergy’s claim undermines the credibility of the application before the Commission. Moreover, relieving FirstEnergy from the obligation to address its past statements and positions that directly contradict its current request for approval of Rider RRS—based upon the

flawed technical argument discussed below—would only prejudice this process and the distribution customers of FirstEnergy that are being asked to provide it with a bailout.

A. IGS Authenticated Ms. Vespoli's Testimony

FirstEnergy's appeal is based solely on claim that Mr. White failed to authenticate Ms. Vespoli's testimony (Ex. MW-1). FirstEnergy claims that Mr. White failed to do so because he did not include a certified copy of Ms. Vespoli's testimony at the time he prefiled his testimony. FirstEnergy Appeal at 8-9, 13. As discussed below, FirstEnergy mischaracterizes the standard of authentication under the Ohio Rules of Evidence and Commission practice.

Initially, the Commission is not bound by the rules of evidence. *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982). While they may provide guidelines, the Commission is permitted to exercise its discretion to manage its own proceedings. That is exactly what the Attorney Examiner did: "Your renewed objection is noted for the record; however, we are upholding our prior ruling, exercising our administrative discretion, and the Commission will afford this document the weight that it deserves." Tr. Vol. XXV at 5107.

Regardless, IGS submitted sufficient evidence to pass the low standard required for authentication under the Ohio Rules of Evidence. Under Evidence R. 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication or identification can be achieved in several ways. Evidence R. 901(b) provides "[b]y way of illustration only, and not by way of limitation" (emphasis added) several ways to satisfy the rules of authentication or identification:

- testimony of a witness¹
- Comparison by a trier or expert witness²
- Distinctive characteristics and the like³
- Public records or reports⁴

Any combination of items listed in rule 901(b) or outside of the non-exhaustive list will suffice to satisfy rule 901(a). Evidence R. 901(b); *see also State ex rel. Montgomery v. Villa*, 101 Ohio App. 3d 478, 484 (1995) Court of Appeals, 10th Appellate Dist. Moreover, “[a] proponent may demonstrate genuineness or authenticity through direct or circumstantial evidence.” *State v. Tyler*, 196 Ohio App.3d 443 at 450 (2011) Court of Appeals of Ohio, Fourth District, Ross County (citing Evid. R 901)(emphasis added).

Courts hold that “[t]he threshold for admission is quite low, and the proponent of the evidence need only submit evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* (emphasis added). Courts have called the burden of authentication as “slight” and much lower than other evidentiary rules: “the showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility.” *State ex rel. Montgomery v. Villa*, 101 Ohio App. 3d 478, 484-85 (1995) Court of Appeals, 10th Appellate Dist. (citing *US v. Reilly*, 33 F. 3d 1396 - Court of Appeals, 3rd Circuit 1994)(emphasis added).

¹ Evidence R. 901(b)(1).

² Evidence R. 901(b)(3).

³ Evidence R. 901(b)(4).

⁴ Evidence R. 901(b)(7). “Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.” *Id.* R.C. 149.43 broadly states that “‘Public record’ means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units”

Indeed, “there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility.” *Id.* at 485. (1991). Ultimately, once a document passes the low threshold needed to establish authenticity, “the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court.” *State Ex. rel. Montgomery* at 485; *see also State v. Easter*, 75 Ohio App.3d 22, 25 (1991) (“This low threshold standard does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be.”) One must demonstrate only a reasonable likelihood that the evidence is authentic. *State v. Jackson*, 2011 Ohio 5593 at ¶15, Court of Appeals of Ohio, Twelfth District.

Moreover, Evidence Rule 902 provides several categories of documents that are self-authenticating, such as certified copies of public records or domestic documents filed under seal. No extrinsic evidence of authentication is necessary to admit any such document.

Challenges to a determination on authenticity are reviewed under an abuse of discretion standard. “An abuse of discretion is more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude.” *State v. Easter* at 26. Thus, the Attorney Examiner was permitted to determine—based upon any combination of factors discussed above, including circumstantial evidence—that Ms. Vespoli’s testimony was what Mr. White purported it to be, so long as that determination was not unreasonable, arbitrary, or unconscionable. As discussed below, the Attorney Examiners properly concluded that Ms. Vespoli’s testimony (Ex. MW-1) satisfied the low

threshold required for authentication. Authentication was achieved in several different ways.

First, the source of the document attached to Mr. White's testimony is clearly stated on the document itself—the author of the document is listed on its face as Leila Vespoli, General Counsel, FirstEnergy. The subject matter and audience are identified as well on the face of the document. The document itself, coupled with context and general knowledge of FirstEnergy's policy positions in 2011 (or the five years before and three years after) provides sufficient context for any expert or Attorney Examiner to conclude that there is a reasonable likelihood that Ms. Vespoli's testimony is indeed authentic. While that would be enough, there is much more.

Second, Mr. White stated in his testimony that Ms. Vespoli filed this document before the Ohio House Public Utilities Committee on October 19, 2011. He stated that he believed the statements in Ms. Vespoli's testimony were consistent with policy positions that FirstEnergy had taken before the Ohio General Assembly. When asked the context of her testimony on cross-examination, he indicated that she offered the testimony in support of competitive markets and in opposition to subsidized generation.⁵ Moreover, Mr. White indicated that the document was first obtained on the FirstEnergy website.⁶ One can safely assume that FirstEnergy's website does not post false documents regarding its General Counsel.

Third, after it became apparent that FirstEnergy removed Ms. Vespoli's testimony from its website following the filing of Mr. White's testimony (presumably in response to

⁵ Tr. Vol XXV at 5100.

⁶ Tr. Vol. XXV 5099.

the testimony filed by Mr. White), Mr. White directed his regulatory team to procure a certified copy of Ms. Vespoli's testimony from the Ohio General Assembly via the Legislative Service Commission.⁷ The document was readily attainable, because under Rule 44 of the Ohio House of Representatives, the Clerk had a duty to maintain Ms. Vespoli's testimony.⁸ As he stated, "[s]o it's the same words, but the copies that I have on the stand are certified copies."⁹ His comparison of the two documents provides further evidence that the document passes the low standard required for authentication. Moreover, the fact that Mr. White confirmed that Ms. Vespoli's testimony is a public record stored by the General Assembly (and Legislative Service Commission) lends further support to its authenticity. See Evid. R. 901(b)(7).

Fourth, because Mr. White obtained a certified copy of Ms. Vespoli's testimony,¹⁰ any failure to authenticate the document is moot. The certified public record Mr. White

⁷ See *Id.* at 4984-85 ("So it's the same words, but the copies that I have on the stand are certified copies"). Arguably, FirstEnergy's removal of the testimony from its website creates a situation where it has requested an equitable remedy without clean hands, which courts in this state do not permit. "The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy." *Marinero v. Major Indoor Soccer League*, 81 Ohio App. 3d 42, 45 (1991) Court of Appeals, Summit County. FirstEnergy claims that failure to strike the testimony would be inequitable and "unfair" (FirstEnergy Appeal at 10-11); yet it appears FirstEnergy removed Ms. Vespoli's testimony from its website following its use in this proceeding.

⁸ Rules of the Ohio House of Representatives, Rule 44, "Records open to examination; filing of records. During the period of sessions, committee records shall be open for examination by any member of the House. At reasonable times and subject to adequate safeguards established by the chair to protect and preserve such records, any citizen of Ohio may also examine committee records. Upon final adjournment of the House, the committee records shall be filed with the Clerk, to be kept for a period of two years, after which time said records shall be filed with the Legislative Service Commission." <https://www.legislature.ohio.gov/publications/rules-of-the-house>. Chapter 101 Revised Code places additional record retention requirements on the General Assembly.

⁹ Tr. Vol. XXV at 4984-85.

¹⁰ The document that Mr. White procured could also be classified as a domestic public document under seal. See Evid. R. 902(1).

reviewed is self-authenticating, but, it is also an admission of a party opponent.¹¹ As such, it could be offered into evidence at any time. Similarly, at a prior stage of the hearing, the Attorney Examiner took administrative notice of prior testimony submitted by a FirstEnergy Solutions witness Sharon Noewer in Case No. 12-426-EL-SSO, *et al.*¹² If prior testimony in that case may be administratively noticed, there is no reason why Ms. Vespoli's testimony before the Ohio General Assembly cannot as well.

Finally, the Commission is not required to adhere to the rules of evidence discussed above. Indeed, Attorney Examiners are provided a wide degree of discretion to manage the admissibility of evidence. Utilizing her discretion, the Attorney Examiner determined that Ms. Vespoli's testimony was relevant and should be admitted into evidence.¹³ Accordingly, FirstEnergy's appeal lacks merit.

2. The Commission Should Not Certify the Appeal

FirstEnergy claims that the Commission departed from past precedent when it failed to require Mr. White to include a certified copy of Ms. Vespoli's testimony when he prefiled his testimony. FirstEnergy further claims that Mr. White was permitted to amend his prefiled testimony by relying upon a certified copy of Ms. Vespoli's testimony at the hearing. While FirstEnergy's legal argument is fatally flawed, there is no need for

¹¹ See Evidence Rule 801(D)(2). "The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." Under Evidence Rule 903, "[t]he testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing."

¹² Tr. Vol. XI. at 2395.

¹³ Tr. Vol. XXV at 5035-36; 5107.

the Commission to address it. The ruling did not deviate from precedent; there is no basis to certify the appeal.

Initially, parties often include excerpts or complete copies of another parties' testimony without including a certified copy. For example, the Testimony of J. Edward Hess, Ex. JEH-1 filed on May 4, 2012 included uncertified copies of schedules taken from Ohio Power Company's application for an electric transition plan.¹⁴ This is not a new practice. Mr. Hess also submitted prefiled testimony in Dayton Power & Light's ("DP&L") electric security plan that attached the prior electric transition plan testimony of witness Ralph Luciani, which was not certified.¹⁵ Mr. Hess provided testimony before the Commission for more than two decades on behalf of the Commission Staff and other parties. If his testimony did not include certified copies of the testimony to which he referred, one can safely include that precedent does not require it.

Moreover, Mr. White did not amend his prefiled testimony. He testified at the hearing that he had reviewed a certified copy that contained the exact same words as the testimony he relied upon: "[s]o it's the same words, but the copies that I have on the stand are certified copies."¹⁶ Because the documents are identical in substance, there can be no claim that FirstEnergy was prejudiced or denied the opportunity to cross-examine Mr. White on his testimony.

¹⁴ *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 §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et. al.* Direct Testimony of Edward Hess, JEH-1 (May 4, 2012).

¹⁵ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer*, Case Nos. 12-426-EL-SSO (Mar. 1, 2013).

¹⁶ Tr. Vol. XXV at 4984-85.

Each of the cases that FirstEnergy relies upon misses the mark. Those cases provide instances where a witness attempted to submit newly minted testimony on the eve of trial, which unduly surprised other parties to the proceeding. Mr. White made no such filing. His testimony remained completely unchanged. Indeed, FirstEnergy deposed Mr. White with respect to Ms. Vespoli's testimony in March of 2015 and was given the opportunity to submit written discovery on that testimony. And Mr. White's conclusions with respect to FirstEnergy's inconsistent behavior remain unchanged from the time he submitted his prefiled testimony in March. Thus, there is no prejudice to FirstEnergy.

What this appeal really boils down to is FirstEnergy's displeasure with an unremarkable ruling on a motion to strike. Such motions are made every day in Commission hearings. Some are granted; some are denied. But failure to grant a motion to strike does not result in a novel issue of law or departure from past precedent. If it did, interlocutory appeals would be filed every day.

III. CONCLUSION

For the reasons stated herein, the Commission should not certify FirstEnergy's appeal. While FirstEnergy claims the ruling deviates from precedent, it is clear that only one deviation has occurred in this proceeding: FirstEnergy's stance on competitive markets. FirstEnergy should not be relieved of the requirement of explaining to the Commission and its customers why it seeks a remedy in this proceeding wholly inconsistent with its prior public policy positions.

Respectfully submitted,

/s/ Joseph Olikar

Joseph Olikier (0086088)
Counsel of Record
Email: joliker@igsenergy.com
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Facsimile: (614) 659-5073

Attorney for Interstate Gas Supply, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply of Interstate Gas Supply, Inc.* was served this the 19th day of October 2015 via electronic mail upon the following:

Thomas.mcnamee@puc.state.oh.us Thomas.lindgren@puc.state.oh.us Ryan.orourke@puc.state.oh.us mkurtz@BKLawfirm.com kboehm@BKLawfirm.com jkylern@BKLawfirm.com stnourse@aep.com mjsatterwhite@aep.com yalami@aep.com joseph.clark@directenergy.com ghull@eckertseamans.com myurick@taftlaw.com zkravitz@taftlaw.com Schmidt@sppgrp.com ricks@ohanet.org tobrien@bricker.com mkl@bbrslaw.com gas@bbrslaw.com ojk@bbrslaw.com wtppmlc@aol.com lhawrot@spilmanlaw.com dwilliamson@spilmanlaw.com blanghenry@city.cleveland.oh.us hmadorsky@city.cleveland.oh.us kryan@city.cleveland.oh.us jscheaf@mcdonaldhopkins.com gkrassen@bricker.com dstinson@bricker.com dborchers@bricker.com drinebolt@ohiopartners.org meissnerjoseph@yahoo.com LeslieKovacik@toledo.oh.gov trhayslaw@gmail.com Jeffrey.mayes@monitoringanalytics.com mhpeticoff@vorys.com mjsettinieri@vorys.com glpetrucci@vorys.com msoules@earthjustice.org sfisk@earthjustice.org Larry.sauer@occ.ohio.gov	burkj@firstenergycorp.com cdunn@firstenergycorp.com jlang@calfee.com talexander@calfee.com dakutik@jonesday.com sam@mwncmh.com fdarr@mwncmh.com mpritchard@mwncmh.com cmooney@ohiopartners.org callwein@wamenergylaw.com mswhite@igsenergy.com Bojko@carpenterlipps.com Allison@carpenterlipps.com hussey@carpenterlipps.com barthroyer@aol.com athompson@taftlaw.com Christopher.miller@icemiller.com Gregory.dunn@icemiller.com Jeremy.grayem@icemiller.com blanghenry@city.cleveland.oh.us hmadorsky@city.cleveland.oh.us kryan@city.cleveland.oh.us tdougherty@theOEC.org finnigan@edf.org Marilyn@wflawfirm.com todonnell@dickinsonwright.com matt@matthewcoxlaw.com mfleisher@elpc.org mitch.dutton@fpl.com selisar@mwncmh.com ccunningham@akronohio.gov asonderman@keglerbrown.com sechler@carpenterlipps.com gpoulos@enernoc.com toddm@wamenergylaw.com amy.spiller@duke-energy.com Jeanne.kingery@duke-energy.com dwilliamson@spilmanlaw.com lhawrot@spilmanlaw.com
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Michael.schuler@occ.ohio.gov Kevin.moore@occ.ohio.gov	
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/s/Joseph Olikier
Counsel for Interstate Gas Supply, Inc.

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Summary: Reply to Interlocutory Appeal of FirstEnergy electronically filed by Mr. Joseph E. Oliker on behalf of IGS Energy