

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ohio</b>	)	
<b>Edison Company, The Cleveland Electric</b>	)	
<b>Illuminating Company, and The Toledo</b>	)	<b>Case No. 14-1297-EL-SSO</b>
<b>Edison Company for Authority to Provide for</b>	)	
<b>a Standard Service Offer Pursuant to R.C.</b>	)	
<b>4928.143 in the Form of An Electric Security</b>	)	
<b>Plan</b>	)	

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM  
CONTRA OREGON CLEAN ENERGY LLC’S MOTION FOR LEAVE TO FILE  
*AMICUS CURIAE* BRIEF**

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**I. INTRODUCTION**

Oregon Clean Energy, LLC ‘s (“OCE”) Motion for Leave to File *Amicus Curiae* Brief (the “Motion”) should be denied. The Motion is untimely, extremely prejudicial and unfair, and presents evidence outside of the record which cannot be considered. OCE has presented no valid reasons for its delay. Further, its concerns are already adequately represented by multiple parties and have been thoroughly litigated in this proceeding. For these reasons, OCE has failed to meet the Commission standard for obtaining leave to file an amicus brief.

**II. STANDARD OF REVIEW**

The Commission’s determination “as to whether it is appropriate to permit the filing of amicus briefs in a proceeding must be made based on the individual case [at] bar and the issues proposed to be addressed by the movant.”<sup>1</sup> When making this determination, the Commission examines whether the submission of amicus briefs will prejudice any party and whether the

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<sup>1</sup> *In re Application of Duke Energy Ohio, Inc. for an Increase Its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, et al., 2013, Ohio PUC LEXIS 259, Entry, \*12 (Nov. 13, 2013).

amicus briefs will assist with the consideration of the legal issues briefed in the proceeding.<sup>2</sup> An amicus brief that does not focus on a discrete legal issue but attempts to provide out-of-record factual testimony is prejudicial and inappropriate.<sup>3</sup>

#### **IV. ARGUMENT**

##### **A. OCE's Amicus Brief Will Prejudice the Companies and Other Parties.**

OCE is not seeking belated leave to address a discrete legal issue in this proceeding. Quite to the contrary, it is attempting to slip into the record essentially unverified testimony regarding its operations and PJM's markets. OCE seeks to introduce this pseudo-testimony without subjecting it to discovery, cross-examination or rebuttal by the Companies and the other parties to this proceeding. In short, no party to this proceeding has had or will have the opportunity to question or challenge the factual claims made in OCE's brief. Thus, allowing OCE to file its amicus brief would prejudice the Companies and those other parties.

OCE had ample opportunity to participate and provide testimony in this proceeding. Rider RRS, which is the exclusive focus of OCE's brief, was first proposed by the Companies in this proceeding on August 4, 2014. Motions to intervene were due by October 1, 2014.<sup>4</sup> Approximately fifty parties timely took advantage of the opportunity to intervene, but OCE did not. In the more than seventeen months following the Companies' Application, the Companies and interested stakeholders have vigorously litigated this case. The parties have conducted extensive discovery and depositions, participated in two rounds of evidentiary hearings covering 41 days, and worked to reach several stipulations. During the evidentiary hearings, multiple

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<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> Entry, p. 1 (August 29, 2014).

Company witnesses were subject to cross-examination regarding the Oregon Clean Energy Center.<sup>5</sup> No OCE witness was made available for cross-examination. If OCE had appeared in the case, the Companies and other parties would have been able to explore, for example, how OCE's financing obtained in November 2014 was not affected by the Companies' Application filed several months earlier. Since OCE was able to obtain that financing, the Application clearly did not harm OCE or the competitive market. But OCE deprived the Companies and the other parties of that opportunity.

The Companies filed the Third Supplemental Stipulation on December 1, 2015. On December 9, 2015, the Attorney Examiner reopened the record for the limited purposes of holding a hearing regarding the Third Supplemental Stipulation and to provide the parties with "an opportunity to present evidence related to the Third Supplemental Stipulation."<sup>6</sup> That entry also established a procedural schedule. OCE failed to move to intervene at that time, or by the time the hearing ended on January 22, 2016. In fact, OCE did not seek to intervene or to file an amicus brief until February 16, 2016, the day post-hearing briefs were due.

OCE's sole purported justification for seeking leave to file an amicus brief is that Staff signed the Third Supplemental Stipulation.<sup>7</sup> That argument rings particularly hollow since OCE failed to move to intervene when Staff signed the Third Supplemental Stipulation.

The prejudice to the Companies and other parties to this proceeding is amplified by the gamesmanship displayed by OCE. OCE is represented by experienced counsel, active in both this proceeding and the AEP Ohio PPA proceeding on behalf of numerous clients. Even if OCE

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<sup>5</sup> Hearing Tr. Vol. IV at 843 (Mikkelsen Cross); Hearing Tr. Vol. XI at 2314-15 (Moul Cross); Hearing Tr. Vol. XV at 3227-29, 3230-21 (Phillips Cross).

<sup>6</sup> Entry, pp. 4-5 (December 9, 2015)

<sup>7</sup> OCE Motion, p. 5.

was somehow not aware of this proceeding, OCE and its counsel were certainly aware of this case when OCE sought to file an amicus brief in the AEP Ohio proceeding on February 1, 2016. However, OCE did not seek leave to file an amicus brief in this case at that time, instead seeking to game the system by filing its motion with its brief attached to prevent the Companies from being able to timely point out its delinquent behavior. If OCE had sought leave to file an amicus earlier, this issue could have been fully briefed before OCE sought to improperly inject its non-record evidence into this docket. OCE strategically chose not to follow the Commission's rules in order to get its non-record claims before the Commission. This type of gamesmanship should not be rewarded. OCE should not be able to sandbag its way through Commission proceedings.

**B. OCE's Brief Will Not Assist With the Commission's Consideration of the Legal Issues in this Proceeding.**

OCE's amicus brief has two parts, neither of which will assist with the legal issues presented in this proceeding. The first part is non-record testimony, which cannot be relied upon in any manner by the Commission. The second part simply duplicates testimony provided by the Independent Market Monitor and other intervenor briefs prepared by OCE's legal counsel, Bricker & Eckler. Neither part of OCE's amicus brief will help the Commission to decide this case.

First, the proposed amicus brief contains evidence that cannot be relied upon by the Commission to justify its decision. "The Commission has an obligation to rely on the evidence admitted into the record, not any party's brief, to justify its conclusions."<sup>8</sup> OCE has made no attempt to rely on record evidence, which establishes the futility of allowing OCE to file an

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<sup>8</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained With the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, Case No. 02-220-GA-GCR, 2005 Ohio PUC LEXIS 311 Opinion and Order (June 14, 2005).

amicus brief. The first five pages of OCE's brief are filled with non-record claims about OCE. OCE has referred to evidence that was never presented on the record including, for example: (1) reasons the Oregon Clean Energy Center is being built; (2) the current status of the construction of the Oregon Clean Energy Center; and (3) the Center's potential contribution to the economy.<sup>9</sup> None of this information is accompanied by a citation to the record. The Companies were not able to cross-examine OCE on any of these claims to evaluate their validity. Thus, the Commission cannot consider any of these alleged "facts" in rendering its decision.

Second, the second part of OCE's brief merely parrots positions taken by PJM and the IMM in testimony and numerous parties in briefs.<sup>10</sup> OCE offers no new arguments or positions which are not already developed in detail by other parties. To this extent, OCE's amicus brief is easily distinguished from PJM's amicus brief filed in this proceeding. PJM was granted leave on January 13, 2016, for the limited purpose of seeking clarification regarding one paragraph in the Third Supplemental Stipulation.<sup>11</sup> Whereas PJM's limited interest may not have been adequately represented by another party, OCE's market-focused criticisms have already been advanced in this proceeding by other generation owners, including Dynegy and Exelon.

Thus, OCE's amicus brief will not assist with the consideration of the issues briefed in the proceeding.

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<sup>9</sup> OCE Amicus, pp. 2-5.

<sup>10</sup> See, e.g., Bowring (IMM) Direct Testimony at 4; Comings (Sierra Club) Direct Testimony at 4; Wilson (OCC/NOPEC) Direct Testimony at 15-16; Exelon Brief, p. 10; Dynegy Brief, p. 4; City of Cleveland Brief, p. 6; Sierra Club Brief, p. 123 .

<sup>11</sup> Entry at pp. 2-3, 9 (Jan. 13, 2016) (referencing clarification of Section V.B.3.a. of Third Supplemental Stipulation).

## II. CONCLUSION

For the foregoing reasons, the Commission should deny OCE's Motion For Leave to File *Amicus Curiae* Brief. In the alternative, the Commission should at minimum strike the non-record evidence contained in Section I (pp. 2-5) of the OCE *Amicus Curiae* Brief.

Date: February 23, 2016

Respectfully Submitted,

/s/ N. Trevor Alexander

James W. Burk (0043808)

Counsel of Record

Carrie M. Dunn (0076952)

FIRSTENERGY SERVICE COMPANY

76 South Main Street

Akron, OH 44308

Telephone: (330) 384-5861

Fax: (330) 384-8375

burkj@firstenergycorp.com

cdunn@firstenergycorp.com

David A. Kutik (0006418)

JONES DAY

901 Lakeside Avenue

Cleveland, OH 44114

Telephone: (216) 586-3939

Fax: (216) 579-0212

dakutik@jonesday.com

James F. Lang (0059668)

N. Trevor Alexander (0080713)

CALFEE, HALTER & GRISWOLD LLP

The Calfee Building

1405 East Sixth Street

Cleveland, OH 44114

Telephone: (216) 622-8200

Fax: (216) 241-0816

jlang@calfee.com

talexander@calfee.com

ATTORNEYS FOR OHIO EDISON  
COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE  
TOLEDO EDISON COMPANY

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail on February 23, 2016.

/s/ N. Trevor Alexander  
N. Trevor Alexander

## **SERVICE LIST**

Thomas.mcnamee@puc.state.oh.us  
Thomas.lindgren@puc.state.oh.us  
Steven.beeler@puc.state.oh.us  
mkurtz@BKLawfirm.com  
kboehm@BKLawfirm.com  
jkylercohn@BKLawfirm.com  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com  
Jennifer.spinosi@directenergy.com  
ghull@eckertseamans.com  
dparram@taftlaw.com  
Schmidt@sppgrp.com  
ricks@ohanet.org  
tobrien@bricker.com  
mkl@bbrslaw.com  
gas@smxblaw.com  
wttpmlc@aol.com  
lhawrot@spilmanlaw.com  
dwilliamson@spilmanlaw.com  
blanghenry@city.cleveland.oh.us  
hmadorsky@city.cleveland.oh.us  
kryan@city.cleveland.oh.us  
mdortch@kravitzllc.com  
rparsons@kravitzllc.com  
gkrassen@bricker.com  
dstinson@bricker.com  
dborchers@bricker.com  
mitch.dutton@fpl.com  
DFolk@akronohio.gov  
mkimbrough@keglerbrown.com  
sechler@carpenterlipps.com  
gpoulos@enernoc.com  
twilliams@snhslaw.com  
dwolff@crowell.com

rlehfeldt@crowell.com  
larry.sauer@occ.ohio.gov  
maureen.willis@occ.ohio.gov  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
cmooney@ohiopartners.org  
callwein@keglerbrown.com  
joliker@igsenergy.com  
mswhite@igsenergy.com  
Bojko@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@theOCE.org  
jfinnigan@edf.org  
Marilyn@wflawfirm.com  
todonnell@dickinsonwright.com  
matt@matthewcoxlaw.com  
mfleisher@elpc.org  
drinebolt@ohiopartners.org  
meissnerjoseph@yahoo.com  
LeslieKovacik@toledo.oh.gov  
trhayslaw@gmail.com  
Jeffrey.mayes@monitoringanalytics.com  
mhpeticoff@vorys.com  
mjsettineri@vorys.com  
glpetrucci@vorys.com  
msoules@earthjustice.org  
sfisk@earthjustice.org

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Summary: Memorandum Contra Oregon Clean Energy LLC's Motion for Leave to File Amicus Curiae Brief electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Cleveland Illuminating Company and The Toledo Edison Company