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 Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	)))))))	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MOTION TO STRIKE PORTIONS OF THE INITIAL BRIEF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL COMMUNITIES), VILLAGE OF HOLLAND, LAKE TOWNSHIP BOARD OF TRUSTEES, LUCAS COUNTY BOARD OF COMMISSIONERS, CITY OF MAUMEE, CITY OF NORTHWOOD, VILLAGE OF OTTAWA HILLS, CITY OF PERRYSBURG, CITY OF SYLVANIA, CITY OF TOLEDO, VILLAGE OF WATERVILLE

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") respectfully move to strike the following portions of the Initial Brief of the Ohio Consumers' Counsel ("OCC") and Northwest Ohio Aggregation Coalition ("NOAC") (collectively referred to as "OCC/NOAC")[1]:

1. Page 1, Line 6 beginning with the word "PUCO" and continuing through the end of Line 9 and including Footnote 2;

2. Page 44, Line 18 beginning with the word "It" and continuing through Page 45, Line 2 ending with the word "defunct";

3. Page 48, Line 18 beginning with the words "The Signatory" and continuing through Page 49, Line 4 ending with the word "stipulation";

[1] The parties to the initial brief also include NOAC's Individual Communities, Village of Holland, Lake Township Board of Trustees, Lucas County Board of Commissioners, City of Maumee, City of Northwood, Village of Ottawa Hills, City of Perrysburg, City of Sylvania, City of Toledo, Village of Waterville

4. Page 145, Line 6 beginning with the word “On” and continuing through Page 146, the end of Line 3 and including Footnote 433;

5. Page 70, Line 1 beginning with the word “FirstEnergy” and continuing through Page 71, Line 1 ending with the word “Vespoli”;

6. Page 104, Line 8 beginning with the word “In” and continuing through the end of Line 21 and including Footnote 338;

7. Page 105, Line 2 beginning with the word “as” and ending with the word “compassion”;

8. Page 106, Line 9 beginning with the word “As” and continuing through Line 11;

9. Page 113, Line 7 beginning with the word “A” and continuing through Line 24 and including Footnote 356; and

10. Page 118, Line 1 beginning with the word “FirstEnergy” and continuing through Line 15 and including Footnote 364.

The Commission should strike this material from OCC/NOAC’s brief because it includes testimony that the Attorney Examiner excluded from the record, hearsay that is not in the record, and unauthenticated testimony. For these reasons and those set forth in the attached memorandum in support, which is incorporated herein, the Commission should grant this motion and strike the portions of OCC/NOAC’s brief listed above.

Date: February 26, 2016

Respectfully submitted,

/s/ David A. Kutik

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MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF THE INITIAL BRIEF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL COMMUNITIES), VILLAGE OF HOLLAND, LAKE TOWNSHIP BOARD OF TRUSTEES, LUCAS COUNTY BOARD OF COMMISSIONERS, CITY OF MAUMEE, CITY OF NORTHWOOD, VILLAGE OF OTTAWA HILLS, CITY OF PERRYSBURG, CITY OF SYLVANIA, CITY OF TOLEDO, VILLAGE OF WATERVILLE

I. INTRODUCTION

On pages 1, 44 and 45 of their Initial Brief, OCC/NOAC quote and discuss testimony that the Attorney Examiner excluded from the record in this case.[2] They *admit* that this information was excluded from the record,[3] but they nonetheless disregard those rulings. To state the obvious: excluded testimony is not part of the record; it should have no bearing on the Commission's consideration of the parties' positions in this case; and it should not remain in OCC/NOAC's brief disguised as "support" for their arguments. Accordingly, the Commission should enforce the Attorney Examiner's rulings that excluded the testimony by striking it from OCC/NOAC's brief.

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[2] This motion does not seek to strike those portions of OCC/NOAC's brief in which OCC/NOAC argue that the Commission should reverse the Attorney Examiner's evidentiary rulings.

[3] OCC/NOAC Br. at 46-48, 171-172.

On pages 145 and 146, OCC/NOAC try another improper tactic - - they seek to interject information that is not in the record into this case by discussing two alleged statements made by Dynegy citing a press release that is also not a part of the record. The Commission has previously rejected this type of backhanded effort to introduce new evidence via a party's brief. And it has explained why the material must be excluded from the record: "[I]f we were to allow evidence to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document."[4] This rings especially true here where the very basis of the alleged information, the press release, is inadmissible hearsay. OCC/NOAC's discussion of the alleged counter-proposals by Dynegy on pages 145 and 156 of their brief is thus doubly flawed and should be removed from the brief.

OCC/NOAC also discuss and quote from an unauthenticated exhibit, Exhibit 1 to the Supplemental Testimony of Matthew White ("MW Exhibit 1") regarding purported testimony of Leila Vespoli before the House Public Utilities Committee. But authentication is a prerequisite to the admission of evidence. The lack of authentication of MW Exhibit 1 makes it inadmissible. Accordingly, the Commission should strike OCC/NOAC's quotation and discussion of purported testimony of Ms. Vespoli contained in MW Exhibit 1 from pages 70, 71, 104-106, 113 and 118 of their brief.

[4] *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, 2006 WL 3932766, at *1(Opinion and Order dated November 21, 2006, at 3) (granting motion to strike and holding that "[d]ocuments that are not part of the record, and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief, or filed after a hearing, and thereby be made a part of the record").

II. ARGUMENT

A. Excluded Testimony Or Evidence Not In The Record May Not Be Relied Upon In A Post-Hearing Brief.

It should be beyond any possible question that excluded evidence or evidence not in the record cannot be relied upon in post-hearing briefs and argument. OCC/NOAC's failure to observe that basic rule requires that portions of that brief be stricken. Specifically, the Commission should strike those portions of the OCC/NOAC brief that discusses: (1) Staff witness Choueiki's prior testimony; (2) Dr. Hill's improper redirect testimony and other information not admitted into the record; and (3) information based on hearsay and newspaper reports not admitted into the record.

1. Dr. Choueiki's testimony from prior proceedings was excluded and reference to it must be stricken.

In the opening page of their brief, OCC/NOAC brazenly quote from testimony that the Attorney Examiner excluded from the record, i.e., Staff Witness Choueiki's testimony from a previous proceeding. (OCC/NOAC Br. at 1, para. 2.) Notably, OCC/NOAC admit that Dr. Choueiki's prior testimony was excluded from the record because it was "unduly prejudicial, confusing, and misleading." (OCC/NOAC Br. at 171-172 citing Hearing Tr. Vol. XXX at 6327.) Indeed, the Attorney Examiner denied OCC's multiple attempts to introduce Dr. Choueiki's testimony into evidence. The Attorney Examiner denied OCC's counsel's attempts to question Dr. Choueiki about the testimony because the questions were friendly cross. (Hearing Tr. Vol. XXX at 6224 (Choueiki Cross).) The Attorney Examiner also denied OCC's attempt to move copies of Dr. Choueiki's prior testimony into evidence. The Attorney Examiner explained, "At this time we will deny admission of the exhibits. . . . [A] change in staff position following the direction of the Commission has no probative weight. It is unduly prejudicial, confusing, and misleading, and these exhibits will not be admitted at this time." (Hearing Tr. Vol. XXX at

6327.) And, for the same reasons, the Attorney Examiner denied OCC's request for administrative notice of the testimony. (Hearing Tr. Vol. XXX at 6327.)

OCC/NOAC apparently believe that they can cite and rely on excluded evidence as long as they label it "proferred." Not so. Testimony may be "proffered" only to preserve a party's right to appeal an evidentiary ruling excluding it.[5] A proffer does not create a backdoor opportunity for a party to rely on that information to support their arguments regarding the merits of the case.

2. Dr. Hill's improper, excluded rebuttal testimony and additional information not admitted into the evidentiary record must be stricken.

In another blatant disregard of the Attorney Examiner's ruling excluding evidence, on pages 44 and 45 of their brief, OCC/NOAC rely on "proffered" testimony of Edward Hill regarding the Consumer Protection Association. (OCC/NOAC Br. at 44-45, n.149.) OCC/NOAC acknowledge that the Attorney Examiner ruled that Dr. Hill's testimony on this subject was beyond the scope of cross examination and struck the testimony from the record. (Hearing Tr. Vol. XXXIX at 8391-8393 (granting motion to strike testimony); OCC Br. at 46-48.) OCC/NOAC's reference to this testimony is wholly inappropriate. In addition, on pages 48 and 49, OCC/NOAC discuss information regarding the Consumer Protection Association that was not admitted into the evidentiary record and rely on it to draw conclusions regarding that party. This information is not part of the record and cannot offer any such "support." Thus, the

[5] *See e.g. In the Matter of the Applications of TNT Holland Motor Express, Inc. to Amend Certificates Nos. 300-R & 407-R.*, PUCO Case No. 89-582-TR-AAC, 1993 WL 13744636, at *1 (Opinion and Order dated Aug. 12, 1993) ("[T]he Commission observes that a proffer of evidence is meant to place a witness' response into the record after an objection to counsel's question has been sustained. The purpose of the proffer is to enable a reviewing court to determine whether or not the testimony should have been admitted."); *State v. Grubb*, 28 Ohio St. 3d 199, 203, 503 N.E.2d 142, 147 (1986) (evidence must be proferred at trial to preserve any objection on the record for purposes of appeal).

Commission should strike OCC/NOAC's discussion of Dr. Hill's testimony and other information not admitted into the evidentiary record on pages 44, 45, 48 and 49 of their brief.

3. Inadmissible and not admitted hearsay may not be relied upon.

On pages 145 and 146, OCC/NOAC reference a press release regarding statements allegedly made by Dynegy. OCC/NOAC's discussion of this information should be excluded for two reasons. First, the information regarding the alleged statements from Dynegy should not be considered because it is not a part of the record.

The Commission has rejected prior efforts of parties to include information in a brief that is not part of the record. *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, 2006 WL 3932766, at *1(Opinion and Order dated November 21, 2006, at 3) (granting motion to strike and holding that "[d]ocuments that are not part of the record, and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief, or filed after a hearing, and thereby be made a part of the record."). The Commission has explained, "[I]f we were to allow evidence to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document." *Id*. So too here.

In addition, the Attorney Examiner has already denied NOAC's attempt to discuss an alleged offer by Dynegy in this case. During cross examination of Company witness Mikkelsen, the Companies objected to NOAC's counsel's question regarding the alleged offer because there was nothing in the record regarding Dynegy. (Hearing Tr. Vol. XXXVII at 7828.) The Attorney Examiner granted the objection. (*Id*. at 7829.)

Second, the press release is hearsay and therefore inadmissible. *In the Matter of the Complaint of the City of Reynoldsburg, Ohio, Complainant*, PUCO Case No. 08-846-EL-CSS,

2011 WL 1428237 (Opinion and Order dated Apr. 5, 2011) (granting motion to strike portions of reply brief that discussed and attached newspaper article and holding "[t]he newspaper article in question is hearsay and consistent with Commission precedent and the Rules of Evidence should not be considered as part of the record in this case"); *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, 2006 WL 3932766, at *1(Opinion and Order dated November 21, 2006, at 3) (finding that affidavit attached to brief was "hearsay, not excused by any exception to the rules of evidence governing hearsay, and is inadmissible as evidence").

B. Unauthenticated Evidence May Not Be Relied Upon.

On pages 70, 71, 104 -106, 113, and 118, OCC/NOAC quote purported testimony of Leila Vespoli before the House Public Utilities Committee contained in Exhibit 1 to the Supplemental Testimony of Matthew White (hereinafter "MW Exhibit 1"). MW Exhibit 1, however, was never authenticated pursuant to the Ohio Rules of Evidence. It was not signed by Ms. Vespoli. And it was devoid of any indication of its provenance. Mr. White admitted that the document was provided to him by counsel for IGS and that at the time he drafted his testimony and testified at deposition, he did not know where his counsel had obtained it. (Hearing Tr. Vol. XXV at 5099).

At hearing on October 7, 2015, the Companies moved to strike MW Exhibit 1 and the testimony relying upon it from Mr. White's Supplemental Testimony because, among other reasons, the exhibit lacked proper authentication. (Hearing Tr. Vol. XXV at 5017-5019).[6] After lengthy arguments, the Attorney Examiners denied the Companies' motion to strike, finding that

[6] As indicated in the hearing transcript, the Companies specifically moved to strike MW Exhibit 1 and the portion of Mr. White's Supplemental Testimony beginning with the word "However" at Page 7, Line 19 and continuing through Page 9, Line 2.

Ms. Vespoli's purported testimony was *relevant* to the case. (Hearing Tr. Vol. XXV at 5035-5036). The Attorney Examiners did not note the evidentiary support they had found for the authenticity of the document.

During cross examination, the Companies renewed their motion to strike MW Exhibit 1 and the testimony relying upon it after establishing that Mr. White received the document from counsel and that he was not aware of from where the document was obtained at the time he prepared his testimony. (Hearing Tr. Vol. XXV at 5099-5105). In response to the Companies' motion, counsel for IGS relied exclusively upon the purportedly certified copy of Ms. Vespoli's testimony to argue the authenticity of MW Exhibit 1. (Hearing Tr. Vol. XXV at 5105-5106). The Attorney Examiners denied the motion to strike, noting their reliance on their prior ruling. (Hearing Tr. Vol. XXV at 5107). Again, despite relying solely on the purportedly certified copy of Ms. Vespoli's testimony in an attempt to establish MW Exhibit 1's authenticity, IGS did not seek to move that copy into evidence. (Hearing Tr. Vol. XXV at 5128).

It is elementary that a condition precedent to admissibility is the authentication or identification of evidence. Evid.R. 901(A)[7]; *Seringetti Const. Co. v. City of Cincinnati*, 51 Ohio App. 3d 1, 9, 553 N.E.2d 1371 (Ohio Ct. App. 1988) (citing *Steinle v. Cincinnati* (1944), 142 Ohio St. 550, 53 N.E.2d 800) ("[P]roof of a writing's execution and authenticity is required as a condition precedent to its admission into evidence."). To be sure, extrinsic evidence of authenticity is not required in all instances. *See* Evid.R. 902 (enumerating categories of self-authenticating documents). But all evidence must be authenticated in some manner.

[7] Evid.R. 901(A) provides: "The 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."

The Commission follows the evidentiary rule that authentication is a condition precedent to admissibility. *See, e.g.*, *Westside Cellular, Inc. v. New Par Companies*, Case No. 93-1758-RC-CSS, 2001 WL 1018827 (April 26, 2001) (denying application for rehearing of attorney examiner's decision to exclude evidence because such evidence was not properly authenticated, among other reasons); *In Re Petition of Ben Donahue & Numerous Other Subscribers of the N. Jackson Exch. of Ameritech Ohio, Complainants*, Case No. 97-718-TP-PEX, 1997 WL 34879135 (Nov. 4, 1997) (finding that certain evidence could be presented at hearing as long as the "evidence is authenticated properly."). Indeed, in this very proceeding, the Attorney Examiners have sustained numerous objections and excluded evidence on several occasions for failures to authenticate certain documents. (*See, e.g.*, Hearing Tr. Vol. I at 145; Hearing Tr. Vol. II at 358; Hearing Tr. Vol. XX at 3870-3871).

There is no foundation in the record to authenticate MW Exhibit 1. The document is not self-authenticating. See Evid.R. 902. And Mr. White did not do anything to authenticate the documents when he prepared his prefiled testimony, thereby failing to satisfy the foundational requirements of Rule 901. The actions of IGS prove the authentication failures of the document as filed. Bringing purportedly certified or self-authenticating copies of the legislative committee testimony to hearing was nothing if not a tacit admission that the filed version of MW Exhibit 1 would be impossible to authenticate and move into evidence. Indeed, counsel for IGS based his authentication argument with respect to MW Exhibit 1 entirely upon the copy of the document Mr. White brought to the stand, which was never admitted into evidence. (Hearing Tr. Vol. XXV at 5105:12-5106:13).

Accordingly, OCC/NOAC's extensive quotation and reliance on an unauthenticated exhibit should be excluded from their brief. This evidence is inadmissible. The Commission

should strike OCC/NOAC's quotation and other discussion of Ms. Vespoli's purported testimony from pages 70, 71, 104-106, 113, and 118 of OCC/NOAC's brief.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' motion to strike.

Date: February 26, 2016

Respectfully submitted,

/s/ David A. Kutik

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26th day of February, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik
David A. Kutik

Summary: Motion to Strike Portions of the Initial Brief of OCC and NOAC electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company