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 NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND APPENDICES A-D

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 Northeast Ohio Public Energy Council ("NOPEC") and Appendices A-D:

1. Page 52, Line 8 starting with the word "The" and continuing through Line 9 ending with the word "SB 221";
2. Page 52, Line 11 starting with the subheading "The Legislative History of SB 221" and continuing through Page 53, the end of Line 18 and including Footnote 184;
3. Page 56, Line 9 the words "the legislative history";
4. Page 56, Line 13 starting with the word "Specifically" and continuing through the end of Line 15 and including Footnote 190;
5. Appendix A;
6. Appendix B;
7. Appendix C; and

8. Appendix D starting on Page 15 with the "Bill Analysis" and continuing through the end of the appendix.[1]

In the above portions of the brief, NOPEC discussed the purported legislative history of 2007 Am.Sub.S.B. 221 ("SB 221") and relied on it to "support" NOPEC's interpretation of the ESP v. MRO test under R.C. 4928.143(C)(1). The Ohio Supreme Court's precedent is clear, however, that the legislative history of a statute should not be considered absent a finding that the statute is ambiguous. *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013). NOPEC, however, does not argue that the language regarding the ESP v. MRO test in Section 4928.143(C)(1) is ambiguous. Nor has the Commission found any ambiguity. In addition, NOPEC's reliance on the draft bills and bill analyses attached to its brief is inappropriate because this material is not in the record of this case. 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 NOPEC's brief and Appendices A-D listed above.

[1] The Companies do not include in this motion the copy of 2007 Am.Sub.S.B. 221 that was passed by the General Assembly, which NOPEC included in Pages 1 through 14 of Appendix D.

Date: February 26, 2016

Respectfully submitted,

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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**

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF THE INITIAL BRIEF OF NORTHEAST OHIO PUBLIC ENERGY COUNCIL AND APPENDICES A-D

I. INTRODUCTION

In its initial brief, NOPEC discussed the purported legislative history of 2007 Am.Sub.S.B. 221 ("SB 221") and relied on this discussion to support its argument regarding the interpretation of the ESP v. MRO test under R.C. 4928.143(C)(1). NOPEC also attached in Appendices A-D of its brief over 100 pages of legislative drafts of 2007 Am.Sub.S.B. 221 ("SB 221") and bill analyses that were prepared by the Legislative Service Commission.

None of this material, however, should be considered by the Commission. The Ohio Supreme Court's precedent regarding the rules of statutory interpretation is clear. A court must first find that a statute is ambiguous before it considers the legislative history of that statute. *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013). NOPEC never makes this argument. Nor has the Commission made this finding. In addition, NOPEC did not introduce the draft bills and bill analyses into evidence at the hearing. This material is not a part of the record of the case and therefore should not be considered. Accordingly, the Commission should strike NOPEC's

discussion of legislative history from its brief and the draft bills and bill analyses attached thereto.

II. ARGUMENT

A. Legislative History Should Not Be Relied On To Interpret Unambiguous Statutory Language

In its initial brief, NOPEC included an extensive discussion of the purported legislative history of S.B. 221 and attached over 100 pages of material in Appendices A-D that included drafts of the bill and analyses of those drafts. (NOPEC Br. at 52-54.) NOPEC relied on this discussion as "support" for its purported interpretation of the ESP v. MRO test under Section 4928.143(C)(1).

NOPEC, however, *never* contends that the language in Section 4928.143(C)(1) regarding the ESP v. MRO test is ambiguous. NOPEC's reliance and discussion of legislative history is thus improper.

The Ohio Supreme Court has established that legislative history of a statute should not be considered unless a court first determines that the statute is ambiguous.[2] *Dunbar*, 136 Ohio St.3d at 186 ("[I]nquiry into . . . legislative history . . . or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning."). Indeed, both of the cases cited by NOPEC in its brief regarding legislative history follow this rule. Both involve statutes that the courts found were ambiguous. (NOPEC Br. at 52, n.180 citing *Griffith v. City of Cleveland*, 128 Ohio St.3d 35, 37

[2] The value of legislative history is also limited. The Ohio Supreme Court has held in the past (as NOPEC pointed out in its brief) that "no legislative history of statutes is maintained in Ohio." (NOPEC Br. at 52, n.180 quoting *State v. Dickinson*, 28 Ohio St.2d 65, 67 (1971).) The Ohio Supreme Court also recently criticized a dissenting opinion because it relied on testimony before the Senate and House committees. The Court explained that "[t]his information is unpersuasive because Ohio does not maintain a comprehensive legislative history of its statutes. Instead, we rely on the language the General Assembly chose and our long-established rules of statutory construction." *State v. South*, 144 Ohio St. 3d 295, 301 (2015).

(2010) ("We consider the statute ambiguous as to the sole issue before us."); *Caldwell v. State*, 115 Ohio St. 458, 460 (1926) ("[W]e have no difficulty in determining that ambiguity exists.").

The Commission, moreover, has not found that the ESP v. MRO test under Section 4928.143(C)(1) is ambiguous regarding the issue that NOPEC argues in its brief, i.e. whether qualitative factors should be considered. Rather, the Commission has repeatedly held that its analysis of this test requires consideration of qualitative factors. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order, 2013 Ohio PUC LEXIS 193 at *125 (Sept. 4, 2013); *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at pp. 55-57 (July 18, 2012); *In the Matter of Columbus Southern Power Company and Ohio Power Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at pp. 73-77 (August 8, 2012). The Commission has explained, "By statute, our analysis does not end with the quantitative analysis, however, as we must consider the qualitative benefits of the . . . ESP, in order to view the proposed plan in the aggregate." *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, 2013 Ohio PUC LEXIS 193 at *125.

Accordingly, NOPEC's discussion of the purported legislative history of SB 221 has no bearing on the interpretation of an unambiguous statute. The Commission should strike this

material from NOPEC's brief and the drafts of SB 221 and bill analyses included in the attached appendices.[3]

B. Evidence Not In The Record May Not Be Relied Upon

NOPEC's discussion of legislative history and the attached draft bills and bill analyses also should be stricken because NOPEC relied on material that is not part of the record in this case. Given that the Ohio Supreme Court has held that Ohio does not maintain legislative history, *Dickinson*, 28 Ohio St. 2d at 67, the draft bills and bill analyses in appendices A through D should have been introduced at the hearing.

NOPEC's submission of over 100 pages of material that is not in the record by attaching it as appendices to its post-hearing brief is inappropriate and should not be considered. Indeed, in *State v. Conyers*, an Ohio court refused to consider material prepared by the Ohio Legislative Service Commission (the same type of reports that NOPEC relied on here) because it was also not submitted in the record of the case. *State v. Conyers*, 1998 WL 456450, at *3, n.1, *aff'd*, 87 Ohio St. 3d 246 (1999). The *Conyers* court noted that "Ohio has no official legislative history." *Id*. (citing *State v. Dickinson*, 28 Ohio St.2d 65, 67 (1971)). In addition, the Commission has rejected other belated efforts to introduce materials via a party's brief. *See 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) (granting motion to strike and holding that "[d]ocuments that are not part of the record, and that were not

[3] Specifically, the Companies request that the Commission strike the following: (1) Page 52, Line 8 starting with the word "The" and continuing through Line 9 ending with the word "SB 221"; (2) Page 52, Line 11 starting with the subheading "The Legislative History of SB 221" and continuing through Page 53, the end of Line 18 and including Footnote 184; (3) Page 56, Line 9 the words "the legislative history"; (4) Page 56, Line 13 starting with the word "Specifically" and continuing through the end of Line 15 and including Footnote 190; (5) Appendix A; (6) Appendix B; (7) Appendix C; and (8) Appendix D starting on Page 15 with the "Bill Analysis" and continuing through the end of the appendix.

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.").

In sum, NOPEC's discussion and reliance on draft bills and analyses prepared by the Legislative Service Commission is inappropriate because this material is not in the record. The Commission should strike the material from NOPEC's brief and attached appendices.

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 NOPEC and Appendices A-D electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company