

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MOTION TO STRIKE
PORTIONS OF THE REPLY BRIEF OF OFFICE OF THE OHIO CONSUMERS’
COUNSEL AND NORTHWEST OHIO AGGREGATION COALITION**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portions of the Reply Brief of Office of the Ohio Consumers’ Counsel and Northwest Ohio Aggregation Coalition (“OCC/NOAC”):

1. The last sentence on Page 1, starting with “Indeed” and ending with “direction.”¹ and footnote 1 on Page 1.
2. Page 81, Line 16 starting with “the PUCO”, continuing through Page 82, Line 18, ending with “defunct”.

The Commission should strike this material from OCC/NOAC’s reply brief because it includes testimony that the Hearing Examiner excluded from the record and is hearsay that is not in the record. Indeed, the Companies have filed a Motion to Strike equivalent statements included in OCC/NOAC’s initial brief.

For this reason and those set forth in the attached memorandum in support, the Commission should grant this motion and strike the portions listed above of OCC/NOAC’s reply brief.

Respectfully Submitted,

/s/ James W. Burk

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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 REPLY BRIEF OF OFFICE OF THE
OHIO CONSUMERS' COUNSEL AND NORTHWEST OHIO AGGREGATION
COALITION**

Portions of OCC/NOAC's reply brief should be stricken because OCC/NOAC improperly rely on testimony the Attorney Examiner excluded from evidence and on hearsay that is not in the record. First, Dr. Choueiki's testimony offered in prior proceedings must be stricken from page 1 of OCC/NOAC's reply brief because it was excluded from the record on multiple evidentiary bases. Second, OCC/NOAC's discussion on pages 81-82 of their reply brief of OMAEG witness Hill's hearsay testimony must be stricken because it was excluded from the record as beyond the scope of re-direct.

1. Dr. Choueiki's testimony from prior proceedings must be stricken.

On page 1 of their reply brief, OCC/NOAC rely on testimony of Dr. Choueiki from prior proceedings that was excluded from the record as having "no probative weight" and being "unduly prejudicial, confusing, and misleading." Hearing Tr. Vol. XXX at 6327. Indeed, the Hearing Examiner specifically denied admission of the two exhibits listed in footnote 1 of

OCC/NOAC's reply brief – OCC Exhibits 30 and 31.¹ Hearing Tr. Vol. XXX at 6218, 6219-20, 6324-27. Thus, Dr. Choueiki's prior testimony is not record evidence, and OCC/NOAC cannot rely upon that testimony in their reply brief.

On February 26, 2016, the Companies filed a Motion to Strike Portions of the Initial Brief of OCC/NOAC that relied upon this same out-of-record evidence. The Companies' arguments in that motion apply equally here and are incorporated herein. As the Companies explained in that motion, the Hearing Examiner properly denied OCC's attempts to question Dr. Choueiki about his prior testimony because it was friendly cross. The Hearing Examiner also properly denied OCC's attempt to move Dr. Choueiki's prior testimony into the record because it lacked probative weight and was unduly prejudicial, confusing and misleading. OCC's proffer of this testimony at hearing merely preserved its right to contest on appeal the Attorney Examiner's decision; the proffer does not make the testimony part of the record that may be cited in post-hearing briefs. *See 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 Aug. 12, 1993); *State v. Grubb*, 28 Ohio St.3d 199, 203, 503 N.E.2d 142, 147 (1986). Therefore, the Commission should reject OCC/NOAC's improper attempt to introduce this testimony into the record via their reply brief.

2. Dr. Hill's improper, excluded rebuttal testimony must be stricken.

OCC/NOAC also rely on "proffered" testimony of Dr. Hill regarding the Consumer Protection Association. When OMAEG improperly sought at hearing to introduce these hearsay statements from Dr. Hill on re-direct, the Attorney Examiner correctly granted the Companies'

¹ Footnote 1 references pages 6118-22 from Hearing Transcript XXX, which is the cross-examination of Staff witness Scheck by OCC attorney Sauer and Nucor Steel attorney Lavanga. OCC/NOAC may have intended to reference pages 6218-22, which include OCC attorney Willis' friendly cross of Dr. Choueiki that was stricken by the Attorney Examiner. *See* Hearing Tr. Vol. XXX at 6220, 6222.

motion to strike those statements in their entirety as beyond the scope of cross examination. Hearing Tr. Vol. XXXIX at 8388-93. OCC/NOAC admit that this information is not in the record. OCC/NOAC Reply Brief, p. 81. OCC/NOAC also recognize that they have no idea whether the proffered information is true. *Id.* Thus, these statements are not record evidence, and OCC/NOAC cannot rely upon them in their reply brief.

The Companies' arguments against OCC/NOAC including these statements in their initial brief apply equally here and are incorporated herein. *See* Companies' Motion to Strike Portions of the Initial Brief of OCC/NOAC, pp. 2, 4-5 (Feb. 26, 2016). The Commission has rejected prior efforts of parties to include information in a brief that is not part of the record. *See, e.g., In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, Opinion and Order at 3 (Nov. 21, 2006). If allowed to remain in OCC/NOAC's reply brief, the Companies would be prejudiced as they would have no opportunity to refute Dr. Hill's hearsay statements. Therefore, the Commission should reject OCC/NOAC's improper attempt to introduce these statements into the record via their reply brief.

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that this Motion to Strike was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 4th day of March, 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/ N. Trevor Alexander
One of Attorneys for the Companies

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Summary: Motion to Strike OCC Post-Hearing Reply Brief electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Cleveland Illuminating Company and The Toledo Edison Company