

**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)
a Standard Service Offer Pursuant to R.C.)
§ 4928.143 in the Form of an Electric)
Security Plan.)

**JOINT MEMORANDUM CONTRA FIRSTENERGY’S MOTION TO STRIKE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND
NORTHWEST OHIO AGGREGATION COALITION**

The Office of the Ohio Consumers’ Counsel (“OCC”)¹ and the Northwest Ohio Aggregation Coalition (“NOAC”) file this memorandum contra the motion of FirstEnergy² to strike portions of their Joint Initial Brief. FirstEnergy’s claims and allegations in its motion are without merit. Accordingly, the Attorney Examiner’s should deny FirstEnergy’s motion to strike.

I. INTRODUCTION

On February 16, 2016, OCC/NOAC filed its Initial Brief in this proceeding opposing FirstEnergy’s Electric Security Plan, as modified by numerous stipulations. On February 26, 2016, FirstEnergy filed a motion to strike portions of the OCC/NOAC Initial Brief. FirstEnergy mistakenly believes that certain portions of the OCC/NOAC

¹ OCC represents 1.4 million customers of FirstEnergy. FirstEnergy consists of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

² FirstEnergy consists of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Initial Brief should be stricken because: 1) it includes testimony that the Attorney Examiner excluded from the record, 2) amounts to hearsay that is not in the record, and 3) it presents unauthenticated testimony.³ FirstEnergy is wrong.

OCC/NOAC's Initial Brief does not contain improper information or evidence and FirstEnergy has failed to prove otherwise. The information that FirstEnergy seeks to strike from the OCC/NOAC Initial Brief was properly included as either record evidence or as a challenge to an attorney examiner ruling under O.A.C. 4901-1-15(F). For the reasons explained more fully below, the Public Utilities Commission of Ohio ("PUCO") should deny FirstEnergy's motion to strike.⁴

II. RECOMMENDATIONS

A. Excluded testimony or evidence not in the record may be relied upon in a post-hearing brief in order to challenge an attorney examiner's ruling under O.A.C. 4901-1-15(F).

FirstEnergy claims that OCC/NOAC improperly reference excluded or non-record evidence in its Initial Brief. Specifically, FirstEnergy claims that references to PUCO Staff witness Dr. Choueiki's testimony from a previous proceeding and Ohio Manufacturers Association Energy Group ("OMAEG") witness Edward Hill's testimony regarding the Consumer Protection Association were improper because the Attorney Examiner excluded this evidence from the record.⁵ FirstEnergy is incorrect.

Under O.A.C. 4901-1-15(F) a party may raise the propriety of an attorney examiner's written or oral ruling as an issue for the PUCO's consideration by discussing

³ FirstEnergy Motion to Strike Portions of OCC/NOAC Initial Brief at 2 (February 26, 2016).

⁴ On March 1, 2016, OCC/NOAC filed a Motion to withdraw "Line 6 on Page 145 beginning with the word "On" and continuing through the end of line 3 on Page 146" of the OCC/NOAC Initial Brief rendering FirstEnergy's motion to strike that portion of OCC/NOAC's Initial Brief moot.

⁵ See FirstEnergy Motion to Strike at 1; FirstEnergy Memorandum in Support of Motion to Strike at 3-5.

the matter as a distinct issue in the party's initial brief.⁶ Indeed, the PUCO has denied a motion to strike proffered evidence in an initial brief in the past when the evidence was offered under O.A.C. 4901-1-15(F) to challenge an attorney examiner's ruling.⁷

First, OCC/NOAC's reference to the previous testimony of Dr. Choueiki in its Initial Brief was not improper. FirstEnergy specifically seeks to strike the following portion of the OCC/NOAC Initial Brief:

PUCO Staff Witness Choueiki testified previously that “ * * * Staff does not see a need for granting a PPA rider that is tied to electric generation. ...It took over a decade for the Commission to transition the four Ohio EDUs to a fully competitive retail electricity market. Granting a PPA rider is a move in the opposite direction.”⁸

As FirstEnergy notes, this testimony originates from Dr. Choueiki's testimony from a previous proceeding.⁹ The Attorney Examiner denied OCC's requests at the evidentiary hearing to introduce Dr. Choueiki's testimony from two prior proceedings into the record in this proceeding.¹⁰ The OCC then requested that the evidence be proffered.¹¹ Instead of

⁶ See O.A.C. 4901-1-15(F). FirstEnergy even seems to acknowledge this rule of law by stating that its Motion to Strike does not seek to strike the references in OCC/NOAC's Initial Brief to evidence that OCC/NOAC argue the attorney examiners erred in excluding from the record. See FirstEnergy Memorandum in Support of Motion to Strike at 1 n.2.

⁷ See *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010*; *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 10-268-EL-FAC, et al., Opinion and Order at 7-8 (May 14, 2014) (PUCO denying a motion to strike evidence from an initial brief that was excluded from the record but proffered by the party and then included in the initial brief in order to challenge the attorney examiner's ruling).

⁸ OCC/NOAC Initial Brief at 1 citing OCC Ex. 31 (*In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385, Choueiki Direct Testimony at 9 (May 20, 2014); See FirstEnergy Motion to Strike at 1 (FirstEnergy also moves to strike the accompanying footnote).

⁹ See FirstEnergy Memorandum in Support of Motion to Strike at 3.

¹⁰ See FirstEnergy Memorandum Contra Motion to Strike at 3-4.

¹¹ See Tr. Vol. XXX at 6118 -6122 (October 16, 2015) (OCC proffered OCC Ex. 30 the testimony of Dr. Hisham Choueiki in Case No. 14-841-EL-SSO and OCC Ex. 31 the testimony of Dr. Hisham Choueiki in Case No. 13-2385-EL-SSO).

filing an interlocutory appeal the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested that the PUCO reverse the Attorney Examiner's decision to exclude Dr. Choueiki's testimony from the record in its Initial Brief.¹² The portions of the OCC/NOAC Initial Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC's challenge under O.A.C. 4901-1-15(F) to an attorney examiner ruling. The passage from OCC/NOAC's brief should be considered as part of the proffer, as it specifically shows how OCC/NOAC intended to use the stricken evidence. FirstEnergy neglects to discuss or rebut this fact in its motion to strike. Therefore, this portion of the OCC/NOAC Initial Brief is not improper.

In addition, FirstEnergy's Motion to Strike as it relates to Dr. Choueiki's testimony should be denied because, as the Retail Energy Supply Association ("RESA") note,¹³ the hearing record in this proceeding includes testimony from Dr. Choueiki on this very point.¹⁴ Indeed, the hearing record in this proceeding contains the following question and answer between counsel for OCC and PUCO Staff witness Dr. Choueiki:

- Q. I'm not sure, Dr. Choueiki, you answered my question. My question simply was would you believe that if the PUCO were to allow the rider RRS under the staff's alternative recommendation, that that would represent in your mind a move away from fully -- a fully competitive generation market?
- A. Yes, if we are having a theoretical discussion, I would agree with that statement.¹⁵

¹² See OCC/NOAC Initial Brief at 171-173 (OCC/NOAC requesting that the PUCO reverse rulings where the Attorney Examiner erred in denying the admission of OCC Exhibits 30 and 31, the previous testimony of Dr. Choueiki, into the record).

¹³ See RESA's Memorandum Contra the Motion to Strike by FirstEnergy, Case No. 14-1297-EL-SSO, at 2 (March 7, 2016).

¹⁴ See Tr. XXX at 6225:19-6226:4 (Choueiki public).

¹⁵ Tr. Tr. XXX at 6225:19-6226:4 (Choueiki public).

Therefore, the evidence that FirstEnergy is seeking to strike from the OCC/NOAC Initial Brief is already properly before the PUCO. FirstEnergy's motion to strike should be denied.

Second, FirstEnergy moves to strike OCC/NOAC's reference in its Initial Brief to the testimony of OMAEG witness Mr. Hill concerning the Consumer Protection Association.¹⁶ FirstEnergy's motion is, again, without merit. As FirstEnergy notes, the Attorney Examiner struck Mr. Hill's testimony on this subject from the record because it was deemed beyond the scope of cross examination.¹⁷ Instead of filing an interlocutory appeal the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested that the PUCO reverse the Attorney Examiner's decision to exclude Mr. Hill's testimony from the record in its Initial Brief.¹⁸ Again, the portions of the OCC/NOAC Initial Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC's challenge under O.A.C. 4901-1-15(F) to an attorney examiner ruling. FirstEnergy neglects to discuss or rebut this fact in its motion to strike.

Therefore, OCC/NOAC's reference to Dr. Choueiki's and Mr. Hill's testimony is not improper and FirstEnergy's Motion to Strike these portions of OCC/NOAC's Initial Brief should be denied.

¹⁶ See FirstEnergy Motion to Strike at 1 (the relevant portions are numbered 2-3); FirstEnergy Memorandum in Support of Motion to Strike at 4-5.

¹⁷ FirstEnergy Memorandum in Support of Motion to Strike at 4 citing Tr. Vol. XXXIX at 8391-8393.

¹⁸ See OCC/NOAC Initial Brief at 46-49.

B. It is not improper to reference evidence in an initial brief that has been admitted into the record.

FirstEnergy astonishingly claims that OCC/NOAC's reference to an exhibit in the record is not proper.¹⁹ Specifically, FirstEnergy claims that references to the testimony of Leila Vespoli before the House Public Utilities Committee contained in Exhibit 1 of Interstate Gas Supply, Inc. ("IGS") Exhibit 11 ("MW Ex. 1"), which was admitted into evidence, is not appropriate because it was not properly authenticated.²⁰ FirstEnergy is incorrect. It should go without saying that a party may rely upon evidence that was admitted into the record in its post-hearing briefs and argument.

This is FirstEnergy's fourth attempt at excluding this properly admitted evidence from the record.²¹ Like the other three attempts, this attempt should fail too. As FirstEnergy admits,²² the Attorney Examiner in this proceeding denied FirstEnergy's motion to strike MW Ex. 1 on authentication grounds on two separate occasions.²³ Subsequently, the Attorney Examiner admitted IGS Ex. 11 into the record.²⁴ FirstEnergy

¹⁹ See FirstEnergy Motion to Strike at 2 (The relevant portions are numbered 5-10); FirstEnergy Memorandum in Support of Motion to Strike at 6-9.

²⁰ See FirstEnergy Memorandum in Support of Motion to Strike at 6-9.

²¹ IGS as well attempted to assist FirstEnergy in its bid to purge the record of Ms. Vespoli's testimony by seeking to withdraw the exhibit after it had been admitted into evidence. This ploy was stopped when the Attorney Examiner denied IGS' motion. See Tr.

²² See FirstEnergy Memorandum in Support of Motion to Strike at 6-7 citing Tr. XXV at 5017-5019 and Tr. Vol XXV at 5107.

²³ See Tr. XXV at 5037 ("And consistent with those rulings, we are denying the motion to strike MW Exhibit 1."); Tr. XXV at 5107 ("Thank you. Your renewed objection [to MW Ex. 1] 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.").

²⁴ See Tr. XXV at 5128.

then filed an Interlocutory Appeal requesting that the attorney examiner's decision be reversed.²⁵ FirstEnergy's appeal was never ruled upon by the PUCO.

Therefore, the only matter at issue here is whether a party may reference an exhibit in its post-hearing brief, which has been admitted into the evidentiary record. It goes without saying that parties are entitled to rely upon record evidence.

If FirstEnergy wished to further challenge the Attorney Examiner's ruling concerning MW Ex. 1, the proper procedure would have been to raise an objection to the ruling in its Initial Brief.²⁶ FirstEnergy chose not to do so. FirstEnergy filed the wrong pleading. Therefore, it is wholly improper for FirstEnergy to now seek redress by attacking OCC/NOAC's use of the evidence in its Initial Brief. OCC/NOAC, as well as any other party, is well within their rights to reference record evidence in its Initial Brief.

Further, it is important to note that, despite FirstEnergy's apparent assertions to the contrary, the PUCO is not strictly bound by the rules of evidence. Indeed, the Ohio Supreme Court has affirmed that the PUCO "is not stringently confined by the Rules of Evidence."²⁷ As the PUCO has explained:

This latitude stems from the recognition that Commission proceedings lack certain distinctive features of judicial trials;

²⁵ See FirstEnergy's Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiner's Oral Rulings, Case No. 14-1297-EL-SSO (October 13, 2015); FirstEnergy's Motion to Supplement FirstEnergy's Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiner's Oral Ruling, Case No. 14-1297-EL-SSO (October 15, 2015).

²⁶ See 4901-1-15 (F), describing the initial brief of a party as the place to raise the propriety of an attorney examiner's ruling (provided that the party took no interlocutory ruling or that the attorney examiner failed to certify the interlocutory appeal).

²⁷ *Greater Cleveland Welfare Rights Organization, Inc. v. Public Utilities Commission of Ohio*, (1982) 2 Ohio St.3d 62, 68, 442 N.W.2d 1288. See also, *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, (1984), 14 Ohio St.3d 49, 50, 471 N.E.2d 475; *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of the East Ohio Gas Company dba Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry, at pg. 7 (July 28, 2006); *In the Matter of the Complaint Pro Se Commercial Properties v. The Cleveland Electric Illuminating Company*, Case No. 07-1306-EL-CSS, Entry on Rehearing, at pg.. 9 (November 5, 2008).

importantly, fact-finding by a lay jury. Indeed, a substantial risk of misuse by the jury is the basis for many exclusionary rules of evidence, such as the opinion rule and the hearsay rule, and other controlling devices such as limiting instructions. The evidence is excluded, thus, not because it lacks relevance or probative force, but because it is feared that a jury may accord undue weight to a potentially unreliable piece of evidence.²⁸

Therefore, FirstEnergy's motion to strike the portions of OCC/NOAC's Initial Brief that reference MW Ex. 1 should be denied.

III. CONCLUSION

Through its Motion to Strike, FirstEnergy effectively requests that the PUCO deny Ohio consumers the right to challenge an Attorney Examiner's ruling under O.A.C. 4901-1-15(F) as well as the right to rely on record evidence in its Initial Brief. For the reasons set forth in OCC's Memorandum Contra, OCC respectfully requests that the PUCO deny the Motion to Strike portions of OCC/NOAC's Initial Brief filed by FirstEnergy.

²⁸ *In the Matter of the Complaint of Brothers Century 21, Inc. v. The East Ohio Gas Company*, Case No. 84-866-GA-CSS, 1986 Ohio PUC LEXIS 1954, *4 (February 24, 1986).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Joint Memorandum Contra FirstEnergy's Motion to Strike was served upon the persons listed below via electronic transmission this 14th day of March, 2016.

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