

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

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE
A PORTION OF THE POST-HEARING BRIEF OF DIRECT ENERGY SERVICES,
LLC AND DIRECT ENERGY BUSINESS, LLC**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portion of the Post-Hearing Brief of Direct Energy Services, LLC and Direct Energy Business, LLC (collectively, “Direct Energy”), to wit: page 6, the entirety of footnote 3.

The Commission should strike this material from Direct Energy’s brief because it relies upon material that is not in the evidentiary record and it is, in fact, information of which the Attorney Examiners expressly declined to take administrative notice. 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 portion of Direct Energy’s brief listed above.

Date: August 29, 2016

Respectfully submitted,

/s/ David A. Kutik

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**MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY TO STRIKE A PORTION OF THE POST-HEARING BRIEF OF DIRECT
ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC**

I. INTRODUCTION

In footnote 3 on page 6 of its brief, Direct Energy relies upon two pieces of information to support an argument regarding the stipulated return on equity. The first is the Staff Report from the Companies' last base rate case, Case No. 07-55-EL-AIR. The second is information regarding treasury yields on 10- and 30-year bonds. Neither piece of information was admitted into evidence during rehearing. In fact, the Attorney Examiners expressly declined to take administrative notice of the Staff Report. (Rehearing Tr. Vol. X, pp. 1508-12, 1580.) Because this information is not part of the record before the Commission, it should have no bearing on the Commission's consideration of the parties' positions in this case. Accordingly, the Commission should strike the entirety of footnote 3 from Direct Energy's brief.

II. EXCLUDED INFORMATION OR EVIDENCE NOT IN THE RECORD MAY NOT BE RELIED UPON ON BRIEF.

In its March 31, 2016 Opinion and Order in this proceeding, the Commission struck portions of several intervenors' briefs due to their reliance on information outside of the evidentiary record. (March 31, 2016 Opinion and Order ("March 31 Order"), p. 37.) The

Commission noted that “new information should not be introduced after the closure of the record.” (*Id.*). As the Commission has previously observed: “If 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.” *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, 2006 WL 3932766, at *1, Opinion and Order (Nov. 21, 2006), p. 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”).

Direct Energy pays no heed to this simple and necessary rule. And it similarly disregards—and in fact does not even mention—the Attorney Examiners’ express refusal to take administrative notice of the Staff Report in Case No. 07-551-EL-AIR. (Rehearing Tr. Vol. X, pp. 1508-12, 1580.) In ruling upon OCC’s motion to take administrative notice of the Staff Report and another document from the same case, the Attorney Examiner stated, “We are going to deny that motion at this time. That is because no questions were asked regarding those documents or any references made to them.” (*Id.* at 1580).

With respect to the information regarding yields on treasury bonds cited in Footnote 3 to its brief, Direct Energy asserts only that “[t]he Commission may take administrative notice” of the information. (Direct Energy Br., p. 6, n. 3.) Perhaps that would be true if the information had been presented at rehearing in connection with any witness’ testimony. But it was not. As the Commission has noted, it is particularly improper to seek to introduce such information after the record is closed because it precludes a fair opportunity to respond.

For these reasons, the Commission should reject Direct Energy's attempt to submit new evidence on brief, in direct contradiction to the Attorney Examiner's evidentiary ruling; the Commission should strike footnote 3 to Direct Energy's brief. Striking the entirety of the footnote is necessary because all of the information contained therein is inextricably linked to Direct Energy's improper reliance upon information outside of the record.

III. CONCLUSION

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

Date: August 29, 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 29th day of August, 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

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Case No(s). 14-1297-EL-SSO

Summary: Motion Motion to Strike a Portion of the Post-Hearing Brief of Direct Energy electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company