

**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
PORTIONS OF THE REHEARING POST-HEARING BRIEF OF THE OHIO
HOSPITAL ASSOCIATION**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portions of the Rehearing Post-Hearing Brief of the Ohio Hospital Association (“OHA”), to wit:

1. Page 1, at the second paragraph beginning with the word “When” and continuing through the last full sentence of the page ending with the word “back” and footnote 1;
2. Page 12, at the second full paragraph, specifically the sentence beginning with the words “For instance” and ending with the word “generation” and footnote 36.

The Commission should strike this material from OHA’s brief because it includes hearsay that is not in the record and testimony that the Attorney Examiner excluded from the record. 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 OHA’s brief listed above.

Date: August 29, 2016

Respectfully submitted,

/s/ David A. Kutik

Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

**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)	

**MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY TO STRIKE PORTIONS OF THE REHEARING POST-HEARING BRIEF
OF THE OHIO HOSPITAL ASSOCIATION**

I. INTRODUCTION

On the first page of its post-rehearing brief, OHA quotes and comments upon a news article containing statements purportedly made by Ohio Governor John Kasich. This article, however, is not in the evidentiary record in this case. It's also inadmissible hearsay. Further, on page 12 of its brief, OHA quotes testimony that the Attorney Examiners excluded from the record. To state the obvious: excluded testimony is not part of the record; it cannot be considered by the Commission and may not be relied upon by the parties in this case. The discussion of such information and evidence should not remain in OHA's brief disguised as "support" for its arguments.

In its March 31, 2016 Opinion and Order in this proceeding, the Commission struck portions of several intervenors' briefs that relied on material outside of the record or on inadmissible hearsay. (March 31, 2016 Opinion and Order ("March 31 Order"), p. 37.) With respect to stricken material and information otherwise outside the record, the Commission held that "new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record." (*Id.*) The Commission also

granted the Companies' motion to strike as inadmissible hearsay a portion of an intervenor's brief "discussing and quoting a newspaper article." (*Id.*) The Commission should apply the same reasoning here to strike the portions of OHA's brief that rely upon improper material.

II. ARGUMENT

A. OHA's Brief Improperly References And Discusses Material That Is Outside The Record Of This Case And That Is Inadmissible Hearsay.

On page 1 of its brief, OHA cites and quotes from a September 16, 2012 article from the website Vindy.com. (OHA Br., p. 1, n. 1). OHA uses the purported statements of Ohio Governor John Kasich contained in this article to support its arguments in opposition to the proposals of the Companies and the Staff on rehearing.

OHA's reliance on this article is utterly inappropriate. Indeed, the article is not a part of the record before the Commission, and it is classic inadmissible hearsay. (*See* March 31 Order, p. 37; *see also In the Matter of the Complaint of the City of Reynoldsburg, Ohio, Complainant*, Case No. 08-846-EL-CSS, 2011 WL 1428237, Opinion and Order (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*, Case No. 06-786-TR-CVF, 2006 WL 3932766, Opinion and Order (Nov. 21, 2006), p. 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")). Additionally, the quoted alleged statements of Governor Kasich contained within the article are hearsay and unauthenticated. As the Commission has already recognized in this proceeding with regard to newspaper and similar

articles, OHA's reliance on the Vindy.com article and the quotes therein is improper. (March 31 Order, p. 37.)

Accordingly, the Commission should strike OHA's discussion of the news article in the second paragraph on page 1, beginning with the word "When" and continuing through the last full sentence of the page ending with the word "back" and Footnote 1.

B. Excluded Testimony May Not Be Relied Upon On Brief.

On page 12 of its brief, OHA quotes from testimony that the Attorney Examiners excluded from the record, *i.e.*, certain pre-filed testimony of OCC witness Kahal regarding the decisions of FirstEnergy Corp.'s management. (OHA Br., p. 12, n. 36). As an initial matter, OHA erroneously attributes this quote to Mr. Kahal's Rehearing *Direct* Testimony (OCC Ex. 44). (OHA Br., p. 12, n. 35, 36). The quote was, however, actually contained in Mr. Kahal's Rehearing *Rebuttal* Testimony (OCC Ex. 46). At rehearing, the Attorney Examiners struck the portion of Mr. Kahal's Rehearing Rebuttal Testimony quoted by OHA, agreeing with the Companies that it was irrelevant to this case. (Rehearing Tr. Vol. VIII, pp. 1380-83 (granting the Companies' motion to strike Mr. Kahal's Rehearing Rebuttal Testimony as to page 10 beginning at line 16 with the word "Rather" and ending with the word "generation" on line 20.))

OHA's reliance on the stricken portion of Mr. Kahal's testimony disregards the Attorney Examiners' ruling. As the Commission made clear in March, parties may not rely upon evidence which has been stricken from the record. (March 31 Order, p. 37.) OHA's failure to adhere to this basic rule requires a portion of its brief to be stricken. Specifically, the Commission should strike the sentence beginning with the words "For instance" and ending with the word "generation" and Footnote 36 in the second full paragraph of Page 12 of OHA's brief.

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

Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

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

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/29/2016 4:36:53 PM

in

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

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