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

THE OHIO HOSPITAL ASSOCIATION'S MEMORANDUM CONTRA 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 August 29, 2016, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") filed a motion to strike two non-substantive portions of the Rehearing Post-Hearing Brief ("Rehearing Brief") of the Ohio Hospital Association ("OHA"). Specifically, the Companies seek to strike the following sentence from the OHA's Rehearing Brief:

> 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.[1]

Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-1-12(B)(1), OHA respectfully submits this memorandum contra.

[1] Companies Motion to Strike at 1.

II. ARGUMENT

A. OHA voluntary withdraws the quoted statement on page 12 of its Rehearing Brief.

The Companies request that the Commission strike the following statement from the OHA's Rehearing Brief: "For instance, FE Corp. 'expanded its [unregulated merchant generation] business and invested considerable capital with management's decision to acquire Allegheny Energy and its extensive coal generation,'" as well as a corresponding footnote, Footnote 36.[2] The Companies argue that this statement was stricken from the record by the Attorney Examiners in the rehearing. By inadvertent error, the OHA included this statement in its Rehearing Brief. OHA does not dispute the Companies' motion to strike and voluntarily withdraws this statement from its Rehearing Brief.

Even after this statement is removed from the OHA's Rehearing Brief, however, it does nothing to change the substance of the OHA's underlying argument. In fact, the remaining paragraph in the Rehearing Brief states:

> The Commission should not hold FirstEnergy's captive ratepayers accountable for past corporate decisions made by FirstEnergy with nothing to do with Ohio regulation. As indicated by OCC Witness Kahal, "[t]he weak FE Corp. credit ratings are due to a combination of a weak corporate balance sheet and extensive but risky unregulated operations." . . . It is the responsibility of FE Corp.'s management and its shareholders to deal with these poor business decisions, not the responsibility of captive ratepayers.

This argument remains true regardless of whether the stricken statement remains part of the Rehearing Brief. As a result, the removal of this sentence has no impact on the OHA's substantive arguments.

[2] *Id.* at 3.

B. There are no grounds for striking the statements on page 1 of the OHA's Rehearing Brief.

The Companies also request, without legal support, that the Commission strike the following sentences from the OHA's Rehearing Brief:

> When asked in 2008 about the proposed auto bailout, not-yet Ohio Governor John Kasich stated, "If they're (the auto industry) not going to be viable, we shouldn't throw good money after bad." [FN1] To be fair, at least the auto bailouts required the participating companies to make reforms that would secure their long-term viability and allow the companies to eventually return to profitability. And at least the auto companies had to pay some of the money back.

The Companies request that the corresponding footnote 1 be stricken from the record as well:

> Bertram de Souza, Did Kasich Oppose Auto Bailout? Vindy.com, Sept. 16, 2012, http://www.vindy.com/news/2012/sep/16/did-kasich-oppose-auto-bailout/.

The Companies' argument is based solely on a misunderstanding of the hearsay doctrine, and its applicability in Commission proceedings.[3] Indeed, as is readily apparent from the discussion below, the Companies' assertion that the quotation at issue is hearsay is utterly absurd. It is clear that the Companies simply filed their template motion to strike without even analyzing whether the hearsay doctrine actually applies in this situation.[4]

First, and foremost, the Companies completely ignore the Ohio Supreme Court's longstanding recognition that the "[C]ommission is not stringently confined by the Rules of Evidence."[5] As a result, any evidentiary arguments raised by the Companies must be analyzed through this lens.

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[3] Companies' Motion to Strike at 2.

[4] See, e.g., Companies' Motion to Strike Portions of the Brief for Amicus Curiae PJM Interconnection, LLC, Case No. 14-1297-EL-SSO (Feb. 26, 2016).

[5] *Greater Cleveland Welfare Rights Organization, Inc. v. Public Utilities Com.*, 2 Ohio St. 3d 62, 68 (Ohio 1982).

Second, and much more importantly, an examination of the Ohio Rules of Evidence pertaining to the hearsay doctrine quickly confirms that the Companies' argument is baseless as the statement proposed to be stricken is not hearsay. According to the Ohio Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" [Evid.R. 801(C)]. In simpler terms, two elements must be satisfied in order for a statement to be considered hearsay: 1) it must be an out of court statement, and 2) it must be offered to prove the truth of the matter asserted. The quotation in the OHA's Rehearing Brief does not meet the elements required of a hearsay statement, as it is clearly not offered for the truth of the matter asserted. As such, it should not be stricken from the Rehearing Brief.

A statement not offered for its truth is, by definition, not hearsay, nor is it required to fall under an exception to the hearsay rule. The illustrative quotation employed in the OHA's Rehearing Brief is obviously not being offered for the truth of the matter asserted. For the statement to be hearsay, it must have been offered as proof concerning the truth of some aspect of the auto bailout. The quotation does not have this purpose, and was not intended to prove anything relating to the auto bailout. Rather, the quotation is a rhetorical device used to illustrate an analogy for the Commission's consideration, the truthfulness of this statement is irrelevant to its use.[6] Similarly, the Vindy.com article cited by the OHA was the source for the statement and merely demonstrates that the statement was made, not to prove any particular fact about the auto bailout.

[6] The usage of such a device should come as no surprise to the Companies or this Commission. For example, every work of Shakespeare has been quoted in American courts in over 800 judicial opinions. The Economist, *Why Lawyers Love Shakespeare*, http://www.economist.com/blogs/prospero/2016/01/literature-and-law (accessed September 10, 2016). That is not to equate the quote employed by the OHA here with the works of Shakespeare, but rather to illustrate the fact that the use of analogy and comparison is a tool commonly used throughout the practice of law.

The case law cited by the Companies has no applicability in this situation, except to highlight the distinction between hearsay and non-hearsay statements, and further proves OHA's point that the statement at issue is not hearsay. In the examples provided by the Companies, the out of court statements directly address statements offered to prove the truth of the subject matter within the relevant proceeding. For instance, the Companies cite the Commission's March 31, 2016 Opinion and Order in this proceeding, where the Commission granted the Companies' motion to strike a portion of the post-hearing brief for amicus curiae submitted by PJM Interconnection, LLC ("PJM").[7] The Companies' had moved to strike the following statement from the brief: "[m]oreover . . . the Commission has stated that the PJM marketplace remains the primary vehicle it intends to utilize to attract and incent new generation resources."[8] In support of this statement, PJM referenced, in a footnote, a *Cleveland Plain-Dealer* article quoting then-Chairman Andre Porter as stating "I can tell you the existing structure has, in my view, led to very competitive results for residential, commercial and industrial customers in this state."[9]

Unlike the statement used by OHA here, PJM's use of then-Chairman Porter's out of court statement was offered to prove the truth of the matter asserted. In fact, PJM used the out of court statement as proof of the Commission's position that the PJM marketplace remains the primary vehicle to attract new generation. The subject matter of the statement was a direct issue within the proceeding, and PJM attempted to use an out of court statement to support its arguments on that issue. Accordingly, the statement used by PJM met the definition of hearsay and was properly excluded by the Commission.

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[7] *Id.*, citing March 31 Order at 37.

[8] Companies' Motion to Strike Portions of the Brief for Amicus Curiae PJM Interconnection, LLC, Case No. 14-1297-EL-SSO (Feb. 26, 2016) at 1; *see* Brief for Amicus Curiae PJM Interconnection, LLC, Case No. 14-1297-EL-SSO (Feb. 16, 2016) at 4.

[9] *Id.*

The Companies also cite *In the Matter of the Complaint of the City of Reynoldsburg* to support their incorrect argument that the statement used by OHA is hearsay.[10] However, as in the case above, the statement at issue in the *City of Reynoldsburg* case is readily distinguishable from the statement in this case. In that case, the Commission granted Columbus Southern Power's ("CSP") motion to strike portions of the City of Reynoldsburg's Rehearing Brief that discussed an attached newspaper article.[11] Specifically, the newspaper article was offered as proof of the matter actually being asserted by the City of Reynoldsburg concerning distribution cost and engineering issues, which were primary issues in the case.[12]

At the end of the day, the statements at issue in the cases cited by the Companies were properly excluded as hearsay because those statements were offered to prove the truth of matters asserted in those cases. In this case, however, the quotation at issue was not included in OHA's Rehearing Brief for that purpose. As a result, the Companies' attempt to have the quotation treated as hearsay completely misses the mark.

III. CONCLUSION

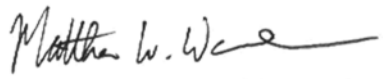
The OHA respectfully requests that the Commission deny the Companies' motion to strike to extent discussed herein.

[10] Companies Motion to Strike at 2.

[11] *In the Matter of the Complaint of the City of Reynoldsburg, Ohio*, Case No. 08-846-EL-CSS, Opinion and Order (Apr. 5, 2011).

[12] See, *In the Matter of the Complaint of the City of Reynoldsburg, Ohio,* Case No. 08-846-EL-CSS, Reply Brief of the City of Reynoldsburg (Feb. 5, 2010) at 7.

Respectfully submitted on behalf of
THE OHIO HOSPITAL ASSOCIATION



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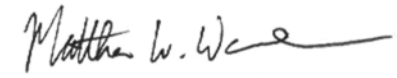
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra was served *via electronic mail* upon the parties of record this 13th day of September 2016.



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Summary: Text The Ohio Hospital Association’s Memorandum Contra 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 electronically filed by Teresa Orahood on behalf of Matthew W. Warnock