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

REPLY OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF THE MOTION 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") moved to strike portions of the Rehearing Post-Hearing Brief of the Ohio Hospital Association ("OHA").[1] In that motion, the Companies moved to strike, among other things, a portion of OHA's brief relying upon a Vindy.com article and the quoted alleged statement of Governor John Kasich included in it.[2] As the Companies have demonstrated, OHA's reliance on this material is improper because: (1) the article is not in evidence; and (2) both the article and Governor Kasich's purported statement constitute inadmissible hearsay.[3]

[1] *See generally* 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 (Aug. 29, 2016) (the "Motion to Strike").

[2] *Id.*

[3] *Id.* at pp. 2-3.

In its Memorandum Contra,[4] OHA primarily argues that the Companies' motion should be denied because neither the Vindy.com article nor Governor Kasich's purported statement meets the definition of hearsay.[5] That contention is flatly wrong; OHA offers the statement for its truth and uses it in an attempt to prove the central point of its initial rehearing brief. Further, and as important, OHA entirely fails to respond to the other basis supporting the Companies' motion—that OHA improperly relies on evidence outside the record. As detailed below, OHA has failed to justify its improper reliance on the Vindy.com article. The Commission should grant the Companies' Motion to Strike.

II. ARGUMENT

A. The Vindy.Com Article And The Quoted Statement Constitute Inadmissible Hearsay.

OHA argues "[f]irst, and foremost" that the Companies have ignored that the Commission is not strictly bound by the Ohio Rules of Evidence.[6] OHA's foremost argument is a feeble one. The Commission consistently and predictably applies the Rules of Evidence, especially where application of those rules prevents prejudice.[7] Indeed, the Commission has enforced the rule against hearsay in this proceeding, previously striking hearsay statements from

[4] *See generally* 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 (Sept. 13, 2016) (the "Memo Contra").

[5] Memo Contra, pp. 3-6.

[6] *Id.* at p. 3.

[7] *See, e.g.*, *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) (striking newspaper article as hearsay "consistent with Commission Precedent and the Rules of Evidence"); *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 (granting motion to strike on hearsay grounds and noting that admitting hearsay evidence after the close of the record would leave opposing parties with "no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document.")).

a newspaper article contained in another intervenor's brief.[8] And, also in this proceeding, the Attorney Examiner observed the fundamental prejudice that the hearsay rule seeks to prevent: "The problem still is and always is that [the Companies] cannot cross-examine the declarant on the contents of the statement."[9] While the Commission may not be strictly bound by the Rules of Evidence, it certainly employs those rules as tools to ensure fairness to the parties and to preserve the integrity of the evidentiary record.

In any event, OHA devotes the majority of its brief to arguing that Governor Kasich's purported statement is not hearsay under Rule 801(C) of the Ohio Rules of Evidence because OHA did not offer the statement "to prove the truth of the matter asserted."[10] Instead, OHA claims that it offered the statement as a "rhetorical device," the veracity of which is irrelevant.[11] But OHA cannot now rewrite the brief that it submitted.

Far from merely employing a rhetorical device, OHA uses the purported statement of the now-sitting Governor of the State to support its attempts to: (1) mischaracterize proposed Rider DMR as a "bailout"; and (2) compare Rider DMR to bailouts of the auto industry that Governor Kasich allegedly opposed for policy reasons.[12] Simply, OHA offers the Governor's purported statement for its truth: any "bailout" of a business that "is not going to be viable" amounts to "throw[ing] good money after bad" and should be rejected.[13] This is classic hearsay under Evid.R. 801(C).

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[8] March 31, 2016 Opinion and Order ("March 31 Order"), p. 37.

[9] Hearing Tr. Vol. XXII, p. 4498 (granting Companies' motion to strike on hearsay grounds).

[10] Memo Contra, pp. 4-6.

[11] *Id.* at p. 4.

[12] Rehearing Post-Hearing Brief of The Ohio Hospital Association ("OHA Initial Rehearing Br."), p. 1.

[13] *Id.*

The purported statement is also double hearsay because it involves both the quoted alleged statement of Governor Kasich and the article's author's transcription of that statement, and both parts must conform to a hearsay exception to be admissible.[14] OHA cannot satisfy the rule. OHA's argument that the Vindy.com article "merely demonstrates that the statement was made" and was not offered "to prove any particular fact about the auto bailout" is wrong for the same reasons its arguments about the statement itself are wrong.[15] The repetition of Governor Kasich's purported statement in the Vindy.com article is inadmissible double hearsay.

Here, the Companies are left with no opportunity to cross-examine any witness about the statements included in the Vindy.com article. Nor do they have the chance to explore the dissimilarities between Rider DMR and the auto bailouts allegedly opposed by the Governor and discussed in the article. This type of fundamental prejudice is why the law has long regarded statements in newspaper articles as "hearsay of the remotest character."[16] The Commission should strike the portions of OHA's brief relying on hearsay.

B. OHA Does Not Dispute That Its Brief Relies On Material Outside Of The Record.

The Companies' Motion to Strike was not premised only on hearsay grounds. The Companies, citing the March 31 Order, also argued that the Vindy.com article reference should

[14] Evid.R. 805 (providing that hearsay within hearsay, or "double hearsay," is not excluded only when "each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"). *See also Almond v. ABB Indus. Systems, Inc.*, 2001 WL 242548, at *7 (S.D. Ohio March 6, 2001) (interpreting the analogous federal rule and stating that the repetition of another's statements in newspaper articles "is clearly hearsay which does not fall under any recognized exception to the rule" even if the original statements would be admissible under an exception).

[15] Memo Contra, p. 4.

[16] *State ex rel. Flagner v. Arko*, Cuyahoga No. 727799, 1998 WL 45342, at *3 (Ohio Ct. App. Feb. 5, 1998) (quoting *Heyman v. City of Bellevue*, 91 Ohio App. 321, 326, 108 N.E.2d 161 (1951)).

be stricken because it was not part of the record.[17] With respect to this argument, OHA's Memo Contra is silent. OHA ostensibly recognizes, however, the impropriety of relying on evidence outside of the record. Indeed, it voluntarily withdrew a portion of its initial rehearing brief that relied on evidence that the Attorney Examiners excluded at hearing.[18] The Commission stated the obvious in its March 31 Order: "[N]ew information should not be introduced after the closure of the record . . . ."[19] That reasoning applies here, and OHA offers nothing in response. The Commission should grant the Companies' Motion to Strike for this reason also.

III. CONCLUSION

For the reasons stated above, and in the Companies' Motion to Strike, the Commission should strike the discussion of the Vindy.com article in the second paragraph of OHA's initial rehearing brief 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.

Date: September 19, 2016

Respectfully submitted,

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[17] Motion to Strike, pp. 1-2.

[18] Memo Contra, p. 2.

[19] March 31 Order, p. 37.

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CERTIFICATE OF SERVICE

I certify that the above was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 19th day of September, 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
One of the Attorneys for the Companies

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