

**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 MOTION TO STRIKE PORTIONS OF THE MEMORANDUM CONTRA OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) have moved to strike portions of the Memorandum Contra the Companies’ Application for Rehearing on behalf of the Ohio Manufacturers’ Association Energy Group (the “OMAEG Memorandum Contra”).¹ The material in the OMAEG Memorandum Contra targeted by the Companies’ Motion to Strike constitutes an untimely application for rehearing and its inclusion in OMAEG’s Memorandum Contra is prejudicial to the Companies.

¹ See Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Strike Portions of the Memorandum Contra of the Ohio Manufacturers’ Association Energy Group (Dec. 2, 2016) (the “Companies’ Motion to Strike”); Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Application for Rehearing on behalf of the Ohio Manufacturers’ Association Energy Group (Nov. 25, 2016).

In its Memorandum Contra the Companies' Motion to Strike, OMAEG offers a series of unpersuasive explanations for its untimely and improper assignment of error.² In the alternative, OMAEG requests that it be permitted to file a memorandum in support of OCC's Application for Rehearing.³ As demonstrated below, each of OMAEG's arguments is factually baseless and legally without merit. The Commission should grant the Companies' Motion to Strike accordingly.

II. LAW AND ARGUMENT

A. Section II.H of OMAEG's Memoranda Contra, Which the Companies Have Moved to Strike, Does Not Relate to the Companies' Application for Rehearing.

Section II.H of the OMAEG Memorandum Contra is the focus of the instant motion. In that Section, OMAEG asserts, for the first time, that the Commission erred when it clarified that the Companies' right to withdraw their ESP does not lapse at least until there is a final, non-appealable order.⁴ Despite the fact that this issue was not raised in the Companies' Application for Rehearing of Fifth Entry on Rehearing ("Application for Rehearing"), OMAEG maintains the Commission should consider its arguments regarding the Companies' right to withdraw the ESP because: "The complexity of this case ... requires that the Commission consider all of the information and arguments collectively."⁵

OMAEG's argument is virtually incomprehensible. As much as the Companies can tell, OMAEG appears to argue that because the Commission's ruling on the Companies' Application

² OMAEG Memorandum Contra Companies' Motion to Strike, pp. 2-5.

³ *Id.* at 6.

⁴ OMAEG Memorandum Contra, pp. 24-26.

⁵ OMAEG Memorandum Contra Companies' Motion to Strike, p. 4.

for Rehearing could change the ESP, the Companies' right to withdraw the ESP might somehow be affected.⁶ Notably, OMAEG never explains why this is so. Nor could it.

The Companies' right to withdraw from the Stipulated ESP IV is established pursuant to the Ohio Revised Code.⁷ Although the Commission's ruling on the Companies' Application for Rehearing may alter the Stipulated ESP IV, the Companies' right to withdraw from the Stipulated ESP IV -- and the timing of the exercise of that right -- is independent of any modification of the Stipulated ESP IV.⁸ To state the obvious, the Commission cannot do anything to change the rules regarding the Companies' right to withdraw their ESP.

But even if the Commission could do anything to change the rules relating to the right to withdraw an ESP, there is nothing in any ruling on the Companies' Application for Rehearing that would require the Commission to address that issue. The Companies did not raise any assignment of error concerning their ability to withdraw from the Stipulated ESP IV in their most recent Application for Rehearing.⁹ Contrary to OMAEG's suggestion, the Commission's ruling on the Companies' Application for Rehearing will not affect the Companies' right to withdraw from the Stipulated ESP IV.

⁶ *Id.* at 2-4.

⁷ R.C. 4928.143(C)(2)(a) ("If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.").

⁸ *See id.*; *In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 26, 144 Ohio St. 3d 1, 8 (2015) (reversing Commission order that modified the utility's ESP and made "it impossible for the utility to exercise its statutory right to withdraw the modified ESP.").

⁹ *See* Companies' Application for Rehearing (Nov. 14, 2016), pp. 1-5 (listing the Companies' assignment of errors).

Section II.H does not address anything in the Companies' Application for Rehearing. Accordingly, it must be stricken.

B. OMAEG's New Assignment of Error Is Prejudicial to the Companies.

OMAEG argues that the Companies will not be prejudiced by OMAEG's arguments because the Companies have already had the opportunity to address them.¹⁰ OMAEG would have the Commission believe that, in making its argument regarding the Companies' right to withdraw their ESP, OMAEG merely relied on the arguments already made by another party, namely, the Office of the Ohio Consumers' Counsel ("OCC").¹¹ Thus, OMAEG contends, the Companies had their opportunity to respond to the arguments raised by OMAEG.

This is wrong. In fact, OMAEG's arguments in support of its position are different from those raised by OCC.¹² Simply put, the Companies have no opportunity to respond to those new arguments. Because the Companies do not have the opportunity to respond, OMAEG's late attempt to assert a new grounds for rehearing is prejudicial to the Companies. OMAEG's untimely and improper assignment of error should be stricken.

¹⁰ OMAEG Memorandum Contra Companies' Motion to Strike, p. 4-5.

¹¹ OMAEG Memorandum Contra, p. 24 (citing Ohio Consumers' Counsel Application for Rehearing (Nov. 14, 2016), pp. 41-43).

¹² Compare OCC/NOAC Application for Rehearing (Nov. 14, 2016), pp. 41-43 with OMAEG Memorandum Contra, pp. 24-26. If, as OMAEG claims, its untimely assignment of error in Section II.H is indeed duplicative and redundant of OCC's arguments, Section II.H should be stricken for this reason as well.

C. OMAEG's Attempt To Raise A New Assignment of Error In Its Memorandum Contra to the Companies' Application for Rehearing Is Inconsistent With the Ohio Administrative Code and Commission Precedent.

OMAEG maintains that it is free to rely on another party's arguments to further one of its own.¹³ According to OMAEG, nothing in the Ohio Administrative Code prohibits such a filing.¹⁴

As an initial matter, there is no factual basis for OMAEG's argument. In its Application for Rehearing, OMAEG did not raise an assignment of error concerning the Commission's ruling on the Companies' right to withdraw the Stipulated ESP IV.¹⁵ As a result, OMAEG could not have relied on OCC's argument to support its own—it never made such an argument in the first place.¹⁶ Instead, OMAEG raised this argument in an effort to support OCC's position, a practice contrary to the Ohio Administrative Code or Commission precedent.¹⁷ Indeed, the Commission has stricken portions of memoranda contra raising arguments in support of other parties' applications for rehearing.¹⁸ OMAEG has failed to address this authority in its Memorandum Contra the Companies' Motion to Strike.

OMAEG's reliance on *In re Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-AT A, Entry (January 2, 2007)

¹³ OMAEG Memorandum Contra Companies' Motion to Strike, p. 5.

¹⁴ *Id.*

¹⁵ See OMAEG's Application for Rehearing (Nov. 14, 2016), pp. 2-3 (listing OMAEG's assignment of errors).

¹⁶ See *id.*

¹⁷ See Memorandum in Support of the Companies' Motion to Strike, pp. 2-4.

¹⁸ See *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007), p. 3.

is misplaced.¹⁹ There, the attorney examiner under Rule 4901-1-12, O.A.C, permitted IEU-Ohio to file a memorandum in support of another party's motion.²⁰ Here, the filings at issue relate to applications for rehearing which are governed by Rule 4901-1-35, O.A.C.²¹ The difference in the rules relating to the ability of parties to file replies is dispositive of the point. Rule 4901-1-12 expressly permits a reply to a memorandum contra a motion, whereas Rule 4901-1-35 does not permit a reply to a memorandum contra an application for rehearing. Thus, adopting OMAEG's position would overlook this distinction recognized by the procedural rules, permit OMAEG to raise an untimely new assignment of error, and deny the Companies the opportunity to respond. OMAEG's attempt to flout the Commission's rules and precedent should be rejected.

D. The Commission Should Deny OMAEG Leave to File a Memorandum in Support of OCC's Application for Rehearing; Doing Otherwise Would Unnecessarily Further Delay These Proceedings.

OMAEG requests leave to file a memorandum in support of OCC's Application for Rehearing. If the Commission grants OMAEG's request, the Companies should be allowed time to respond. Allowing these additional filings, however, will only further delay the resolution of these proceedings. OMAEG erred in failing to raise this issue in a timely manner. It should not be permitted to further delay these proceedings without any cause (let alone good cause) to do so. OMAEG's request should be denied accordingly.

¹⁹ OMAEG Memorandum Contra Companies' Motion to Strike, p. 5 n.15.

²⁰ *In Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-AT A, Entry at 2 (January 2, 2007).

²¹ *See* Memorandum in Support of the Companies' Motion to Strike, p.2.

III. CONCLUSION

For the reasons stated above, and in the Companies' Motions to Strike, the Commission should grant the Companies' Motion to Strike.

Date: December 16, 2016

Respectfully submitted,

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ATTORNEYS FOR OHIO EDISON
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/s/ David A. Kutik

One of the Attorneys for the Companies

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Summary: Reply in Support of Companies' Motion to Strike Portions of OMAEG's Memorandum Contra electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company