

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio :
Edison Company, The Cleveland Electric : Case No. 16-743-EL-POR
Illuminating Company, and The Toledo :
Edison Company for Approval of Their :
Energy Efficiency and Peak Demand :
Reduction Program Portfolio Plans for :
2017 through 2019. :

**MOTION TO STRIKE PORTIONS OF THE
POST-HEARING BRIEFS
OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO
AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**On behalf of the Staff of
The Public Utilities Commission of Ohio**

March 15, 2017

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AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

For fairness in the hearing process and government decision-making affecting all stakeholders participating in the case, the Staff of the Public Utilities Commission of Ohio (“Staff”) and the Office of the Ohio Consumers’ Counsel (“OCC”) respectfully move to strike certain references in the briefs and reply briefs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) that rely on confidential settlement communications and other information outside the record in this proceeding.¹ The Public Utilities Commission of Ohio (“Commission”) provided ample opportunity at the hearing for parties to

¹ Ohio Adm. Code 4901-1-12.

present evidence and for other parties to test that evidence. A fair process does not allow parties, on brief and after the fact, to circumvent that procedure by making one-sided and untested presentations of information to the Commission.

The Commission should strike the following portions of (i) the Initial Brief of the Companies (February 21, 2017), and (ii) the Reply Brief of the Companies (March 3, 2017):

Companies' February 21 Initial Brief:

- a) Page 12 beginning near the bottom of the page with (“-discussions”) through the end of the sentence ending in the next sentence with “process”.
- b) Page 34, Footnote 152, beginning with the word (“the”) in the first sentence until the end of the sentence ending with (“parties”).
- c) Page 35, beginning with Footnote 153 through Footnote 159 and the descriptions of these parties’ interests at the top of page 35 to the middle of the page where information precedes the citations taken from the Motions to Intervene.
- d) Page 48, beginning with (“The delay”) until the end of the sentence ending with (“Staff”) in the first partial paragraph, and the last sentence in the same paragraph beginning with (“The”) until the end of the sentence ending with (“proceeding”).
- e) Page 48, the entire Footnote 221.
- f) Page 48, beginning near the end of the second paragraph with the words (“upon Staff’s”) and ending on page 49 with (“January 23, 2017.”).
- g) Page 49, beginning with (“That”) in the last sentence of the first paragraph until (“Stipulation”) to conclude that sentence.
- h) Page 58, the first sentence of the first full paragraph starting with (“The”) and ending with “matter” and the third sentence in the same paragraph starting with “That is” and ending with (“Companies”).

Companies' March 3 Reply Brief:

- a) Pages 6-7, footnotes 29 through 34, and the descriptions of these parties' interests on pages 6 and 7 that are derived from these parties' motions to intervene.
- b) Page 36, starting with the words ("the Companies *did not*") and continuing through the end of the next sentence ending with ("scheduling"), as well as footnote 192 in its entirety.
- c) Page 43, the last sentence in the first full paragraph beginning with the words ("in line with") and ending with the word ("statutory mandate,") plus footnote 232.

As described in the attached memorandum in support, the Commission should strike these portions of the briefs because they cite and refer to information that constitutes confidential settlement communications, is not evidence in this proceeding, and is hearsay. Allowing off-record, untested information is prejudicial to Staff, OCC and the residential consumers it represents, and all stakeholder interests, and is inappropriate for Commission decision-making.

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MEMORANDUM IN SUPPORT

INTRODUCTION

For fairness in this government process affecting Ohioans, the Commission does not permit parties to include in their post-hearing briefs information that is outside the evidentiary record. The use of non-record information violates Commission precedent and the Ohio Rules of Evidence, which are designed for fairness.² The Commission has established a hearing process for adducing and testing the evidence that parties offer. In their briefs, the Companies rely on information that they did not enter into evidence dur-

²

See, e.g., In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture, PUCO Case No. 06-786-TR-CVF (Opinion and Order at 3) (Nov. 21, 2006); *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO (Order on Remand at 9-10) (Oct. 3, 2011) (granting a motion to strike portions of AEP Ohio's initial brief that included non-record information and stating that it would be improper to take administrative notice of such information at this stage in the proceeding); *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR (Opinion and Order at 8-9) (May 5, 2010) (granting a motion to strike non-record evidence, which included testimony filed in a previous rate case); *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 (Fifth Entry on Rehearing at 169-172) (Oct. 12, 2016) (granting motions to strike portions of rehearing briefs that included information and statements that were not part of the evidentiary record and stating that "parties should not rely upon evidence which has been stricken from the record."); *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 (Opinion and Order at 37) (Mar. 31, 2016) (granting motions to strike portions of reply briefs stating that documents filed in another PUCO proceeding are not part of the evidentiary record and should be stricken).

ing that hearing process. The Commission should strike the portions of their briefs that rely on information that was not admitted into evidence.

The Companies impermissibly make references and statements in five categories.

First, in their Initial Brief, the Companies make reference to settlement discussions and inject their opinion and statement on whether Staff meaningfully participated in that process. The details of Staff's participation in the settlement negotiations are not in evidence. No party sought to introduce them into evidence. They were never mentioned in any pleading in this case, in any party's testimony in this case, or at the hearing in this case. And they constitute confidential settlement communications that are inadmissible.

Second, in their Initial Brief and Reply Brief, the Companies cite to and include descriptions from motions to intervene of different parties. Motions to intervene are not part of the record.

Third, in their Initial and Reply Briefs, the Companies blame Staff for delaying the proceedings by obtaining continuances. The motions requesting the continuances and blame for any delay are not in evidence. No party sought to introduce them into evidence.

Fourth, in their Initial Brief, the Companies state that other parties rejected Staff's cost cap proposal and the reason for this is because they think it exceeds statutory and regulatory authority. No evidence in the record supports these references and statements. And, no party sought to introduce them at trial.

Fifth, in their Reply Brief, the Companies cite a pleading filed in a 2011 case involving AEP Ohio that is not part of the record in this case.

The Commission should strike the portions of the Companies' briefs that improperly rely on information that has not been admitted as evidence in this proceeding. The Commission should not consider or rely on that information, which is outside a fair hearing process, in deciding the merits of this case affecting all stakeholders.

RECOMMENDATIONS

- A. The Commission should strike all portions of the Companies' Initial Brief that makes reference to settlement discussions and an opinion on whether Staff meaningfully participated in that process because this information is not in the record of this case and constitutes inadmissible confidential settlement communications.**

The Companies refer in their Initial Brief to “discussions that Staff chose not to substantively participate in.” The Companies also state: “³Indeed, despite the parties’ various requests for Staff’s input on the Companies’ Proposed Plans, Staff failed to meaningfully participate in the process.”⁴ The Companies provide another reference in a footnote, stating “the Companies left intact multiple provisions in the Stipulation negotiated by those parties.”⁵ The discussions and negotiations referenced were not offered and admitted into the evidentiary record. In fact, there was no reference at all to these discussions during the hearing. Yet now, when there is no opportunity to test the Companies’ assertions, they rely heavily on this non-record information in their arguments to the Commission. This is unfair and is not permitted.

The Companies’ reliance on non-record information is improper and violates Commission precedent. The Commission has continuously rejected efforts by parties to

³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR (Companies’ Post-Hearing Brief at 12) (Feb. 21, 2017) (“Initial Brief”).

⁴ *Id.*

⁵ *Id.* at 34, fn. 152.

include information in a brief that is not part of the record. In doing so, the Commission has defended fairness in its processes by noting: “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.”⁶

Because the Companies chose not to seek admission of this information into the record at hearing, Staff and OCC had none of the required opportunities to test the Companies extra-record information. This result is prejudicial to Staff, OCC, and other stakeholders. Portions of the Companies’ Initial Brief that reference this information should be stricken, consistent with Commission precedent.

Moreover, and perhaps more importantly, settlement communications between parties to PUCO proceedings are confidential. The PUCO's rules plainly state: “Evidence of conduct or statements made in compromise negotiations is . . . not admissible.”⁷ And relying on these rules, “the Commission has long held that settlement negotiations shall remain confidential.”⁸ The Companies cannot reveal what may have taken place in the context of confidential settlement communications to support the arguments made in their briefs. The PUCO should strike from the Companies’ briefs all references to parties’ statements or conduct during settlement negotiations.

⁶ *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF (Opinion and Order at 3) (Nov. 21, 2006).

⁷ Ohio Adm. Code 4901-1-26(E).

⁸ *In re Complaint of Karl Friedrich Jentgen v. Ohio Edison Co.*, Case No. 15-245-EL-CSS (Entry on Rehearing ¶ 33) (Dec. 7, 2016).

B. The Commission should strike all portions of the Companies' Initial and Reply Brief that rely on documents not in evidence.

The Commission should strike all of the Companies' references and citations to the motions to intervene that were filed in the docket of the case, but not introduced and made part of the record of evidence.⁹ The motions cannot be used as evidence to support diversity of parties for serious bargaining because the motions are not evidence in the case. The motions were not offered or admitted into the evidentiary record. The Companies had the opportunity to seek to introduce the information into the record during the hearing process, when Staff and OCC could test the alleged evidence. No party sought to have it admitted. The portions of the Companies' Initial Brief that cite and rely on these motions should be stricken, consistent with Commission precedent and fairness in Commission proceedings.

For the same reasons, the Commission should strike the portions of the Companies' Reply Brief that rely on a filing from a 2011 case involving AEP Ohio.¹⁰ The cited document from the 2011 case involving AEP Ohio is not in the evidentiary record in this case. No party sought admission of this document, and no party had the opportunity to cross examine any witness regarding this document. The Commission should not permit the Companies to rely on this non-record evidence.

⁹ Initial Brief at 35, fns. 153-159; Reply Brief at 6-7, fns. 29-34.

¹⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR (Companies' Reply Brief at 43, n. 232) (Mar. 3, 2017) ("Reply Brief").

C. The Companies' unsupported blame toward Staff for causing delay of the proceedings is unfair and the Commission should not condone such conduct.

The Companies' references and statements in both their Initial and Reply Briefs accusing Staff of delaying the proceedings and blaming them for the delay should be stricken. The Companies state, "[t]he delay has not been at the hands of the Companies, but rather Staff."¹¹ Also, the Companies state, "[t]he Companies did not support those motions - in fact, no other party joined Staff's continued efforts to delay the proceeding."¹² Again, the Companies state, "[e]ven after the Attorney Examiner granted Staff's oral motion for a continuance, the Companies expressed their concern regarding further delay and asked that the hearing not be pushed into late January. Staff, however, persisted that the hearing should not be set prior to the week of January 23, 2017."¹³ The Companies further state, "[t]hat is precisely why the Signatory Parties agreed to include the Amended Trigger provision in the Stipulation."¹⁴

In a footnote, the Companies state, "[t]he Companies did not file oppositions to Staff's motions, but that is simply because EDUs do not typically oppose Staff's motions on procedural issues such as scheduling."¹⁵ The Companies basically repeat that last line in their Reply Brief by stating "[b]ut that is simply because EDUs do not typically oppose

¹¹ Initial Brief at 48

¹² *Id.*

¹³ *Id.* at 48-49.

¹⁴ *Id.* at 49.

¹⁵ *Id.* at 48, fn. 221.

Staff's motions on procedural issues such as scheduling."¹⁶ Finally, in the Reply Brief, the Companies cite to motions to continue, which are not in the record and should be stricken.¹⁷ The Companies rely on a motion to continue for stating "the Companies did not agree to any of Staff's continuance requests—they merely decided to not oppose."¹⁸ That statement should be stricken too because it's information taken from the motion to continue, which is outside of the record of evidence.

None of this information was cited in any documents admitted in the record or testified to by any witness on the witness stand. In sum, none of this information is in the record. Now, after the evidentiary record is closed, the Companies make these statements and claims regarding Staff's conduct in the case. Neither Staff nor any other party had any opportunity to cross-examine the Companies on such statements. Staff believes that this late attack against the Staff made outside of the record by the Companies is an unfair surprise. Staff requests these parts in the Companies' briefs be stricken for being outside of the record.

¹⁶ Reply Brief at 36.

¹⁷ *Id.* fns. 192-193.

¹⁸ *Id.* at 36.

D. The Commission should strike all parts of the Companies' Initial Brief that state that other parties did not support Staff's and OCC's cost cap because they believed it exceeded the Commission's statutory and regulatory authority.

The Companies make references in their Initial Brief to other parties rejecting Staff's and OCC's cost cap proposal because it exceeded the Commission's statutory and regulatory authority. The Companies state, "[t]he Signatory Parties considered and rejected Staff's Cost Cap Proposal in executing the Stipulation in this matter. In fact, to date, no intervenor in this proceeding other than OCC has come forward in support of the proposal. That is because Staff's Cost Cap Proposal exceeds the Commission's statutory and regulatory authority, needlessly duplicates existing cost-control measures, and arbitrarily impacts and prejudices the Companies."¹⁹

No evidence was offered or admitted in the record to support these claims made by the Companies. Neither the Staff, OCC, nor any other party had any opportunity to cross-examine the Companies on such statements and claims. These references and statements should be stricken from the Companies' Initial Brief for being information outside of the record of evidence in this case.

It is fair and reasonable, and indeed essential to fairness in the state government's hearing process, for parties to provide complete and accurate information through the evidentiary hearing process before the Commission. The Companies provided information not in evidence at the last minute in their Initial and Reply Briefs, long after the evidentiary hearing ended. To allow such gamesmanship in the Commission's process

¹⁹

Initial Brief at 58.

(for decision-making in the public interest) is patently unfair and would set a terrible precedent. The Commission should strike all portions of the Companies' briefs where these references and statements are made.

CONCLUSION

For reasons of fairness to parties and to its own decision-making, the Commission does not allow parties to cite information in their briefs that they (or others) did not enter into the evidentiary record in the proceeding. The Companies' briefs wrongly rely on information that is not evidence in this case. Staff, OCC, and other parties to this case have been denied the opportunity to test, via cross-examination or otherwise, the information now appearing for the first time in the Companies' initial and reply briefs. The use of this information is unfair and highly prejudicial to Staff, OCC and the consumers it represents, and the stakeholders participating in this process. The Commission should grant Staff's and OCC's motion to strike.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Motion to Strike Portions of the Post-Hearing Briefs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company** submitted on behalf of the Staff of the Public Utilities Commission of Ohio and the Office of the Ohio Consumers' Counsel, was served via electronic mail upon the following Parties of Record, this 15th day of March, 2017.

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