

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

KUBITZA, Matt, et. al.,	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. 17-1435-EL-CSS
	)	
OHIO EDISON COMPANY	)	
	)	
Respondent.	)	

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**OHIO EDISON COMPANY’S MOTION TO STRIKE PORTIONS OF  
COMPLAINANT’S POST-HEARING BRIEF**

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Ohio Edison Company (“Ohio Edison”) respectfully moves to strike the following portions of Complainant’s Post-Hearing Brief (“Brief”):

1. Page 1, first paragraph: “I had over 200 volts continuously running through half of my system until I got home to turn off my main breaker (picture 1, Ohio Edison’s voltage tester).”
2. Page 1, third paragraph: “I noticed the hand hole was completely full of water and the wires were submerged.”
3. Page 2, second paragraph, starting with “I sent the” through “in conduit.”
4. Page 3, second paragraph, starting with “I figured” through “right there.”
5. Page 4, first paragraph, starting with “A Georgia Tech” through “25-35 years.”
6. Page 4, second paragraph: “If a secondary wire fails, there is a 33.333% chance it will be a neutral which could cause a house fire!”
7. Page 5, final paragraph, starting with “On August 1” through Page 6, first paragraph, ending with “Mr. Carson’s name.”
8. Page 6, second paragraph, starting with “I have talked” through “negligent!”
9. Page 7, second paragraph, starting with “If more information” through “25 years.”

The Commission should strike this material from Complainant's Brief because it is (i) based on evidence not in the record, and (ii) inadmissible hearsay. For these reasons, fully set forth in the attached memorandum in support, the Commission should grant this Motion and strike the above-referenced portions of Complainant's Brief.

Dated: August 22, 2019

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**MEMORANDUM IN SUPPORT OF OHIO EDISON COMPANY’S MOTION TO  
STRIKE PORTIONS OF COMPLAINANT’S POST-HEARING BRIEF**

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**I. INTRODUCTION**

Complainant’s Brief is loaded with evidence not in the record, most of which is inadmissible hearsay. Specifically, Complainant attempts to rely on unsupported statements, conversations he had with individuals not party to the proceeding (some of which were not even mentioned during discovery), and articles that were never authenticated—one of which was explicitly excluded from evidence at the hearing. Complainant’s introduction of new (and already excluded) evidence after the close of the record in this proceeding is improper for two main reasons.

*First*, Complainant attempts to rely on evidence that was never introduced at the hearing. He makes several statements as if they are fact, without any cite to the evidentiary record—because there are none. Complainant also details numerous conversations he supposedly had with his brother and current and former Ohio Edison employees, none of which were discussed substantively at the hearing. He also refers to a number of articles found on Google that were never admitted at the hearing. Indeed, at the very end of the proceeding, Complainant attempted

to introduce one of the articles he now relies on and it was excluded as inadmissible hearsay. Because a substantial portion of Complainant's Brief is not part of the evidentiary record, the Commission cannot now rely on it.

***Second***, in addition to not being part of the evidentiary record, most of the new evidence Complainant attempts to rely on is textbook inadmissible hearsay. The conversations he had with individuals not party to the proceeding (some unidentified), are all out-of-court statements being offered for the truth of the matter asserted. The same is true for the unauthenticated articles—one of which was already explicitly excluded from evidence at the hearing. All of this new hearsay evidence lacks credibility and Ohio Edison would be prejudiced by its admission having not had the opportunity to conduct cross-examination or otherwise respond. Therefore, the Commission cannot now consider it.

For these reasons, the Commission should strike the following portions of Complainant's Brief:

1. Page 1, first paragraph: "I had over 200 volts continuously running through half of my system until I got home to turn off my main breaker (picture 1, Ohio Edison's voltage tester)."
2. Page 1, third paragraph: "I noticed the hand hole was completely full of water and the wires were submerged."
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## II. ARGUMENT

### A. A Substantial Portion Of Complainant's Brief Is Not In The Evidentiary Record In This Proceeding.

It is well established that “new information should not be introduced after the closure of the record.”<sup>1</sup> This is especially true when a party to a proceeding is attempting to introduce documents into the record that were not presented at hearing. As the Commission has held: “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 refute statements contained in the document.”<sup>2</sup>

Last month, the Commission held a hearing in this proceeding. Both Ohio Edison and Complainant had an opportunity to present evidence at this hearing and both did so.<sup>3</sup> Complainant, however, ***did not*** present any evidence related to the number of volts allegedly entering his home (or the referenced picture).<sup>4</sup> Nor did he allege at the hearing (or during discovery) that the hand hole outside his home was full of water.<sup>5</sup> Mr. Kubitza did briefly mention at the hearing that he talked to current and former workers of Ohio Edison. Counsel for Ohio Edison objected, and the objection was overruled “because [Complainant hadn’t] really stated what those conversations were.”<sup>6</sup> And he never did, until his Brief.<sup>7</sup> Complainant also

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<sup>1</sup> *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 & Order, p. 37 (Mar. 31, 2016) (hereinafter “ESP IV March 31 Order”).

<sup>2</sup> *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-0786-TR- CVF, Opinion & Order, p. 2 (Nov. 21, 2006) (granting motion to strike and holding “[d]ocuments that are not part of the record and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief, or filed after a hearing, and thereby be made a part of the record.”).

<sup>3</sup> See generally, Hearing Tr.

<sup>4</sup> Brief at 1, ¶1. See also Hearing Tr. at 47:23-48:3 (sustained objection to a question regarding voltage because it assumed facts not in evidence).

<sup>5</sup> Brief at 1, ¶3.

<sup>6</sup> Hearing Tr. at 15:5-14.

briefly mentioned “something about the Maryland underground cables, [and] Georgia Tech study,”<sup>8</sup> but he never discussed the substance of the articles. At the end of the hearing, Mr. Kubitzka sought to introduce the Maryland article and it was excluded from evidence as inadmissible hearsay.<sup>9</sup> He cannot, then, rely on that same article—or any other unauthenticated article—in his Brief.<sup>10</sup>

Because Complainant did not produce this evidence at the hearing (or it was explicitly excluded), Ohio Edison did not have an opportunity to either cross-examine Complainant about these issues or respond in any manner. As a result, the Company would be prejudiced by the introduction of this new evidence after the close of the case. The Commission should strike the aforementioned portions of Complainant’s Brief.

**B. A Substantial Portion Of Complainant’s Brief Constitutes Inadmissible Hearsay.**

In addition to not being in the evidentiary record, the majority of the new evidence Complainant provides in support of his Brief is also inadmissible hearsay. The Commission has routinely precluded the use of hearsay statements, including articles not produced at hearing, in post-hearing briefs.<sup>11</sup>

Here, Complainant attempts to bolster his allegations by detailing several conversations he had with his brother and current and former Ohio Edison employees.<sup>12</sup> Those conversations are out-of-court statements being offered for the truth of the matter asserted—textbook

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<sup>7</sup> Brief at 2, ¶2; 3, ¶2; 5, ¶3; 6, ¶2.

<sup>8</sup> Hearing Tr. at 15:5-8.

<sup>9</sup> Hearing Tr. at 63:10-64:21.

<sup>10</sup> See Brief at 4, ¶1; 7, ¶2.

<sup>11</sup> See, e.g., ESP IV March 31 Order, p. 37 (“As to PJM’s brief, we agree with FirstEnergy that the portion discussing and quoting a newspaper article is hearsay that is not part of the record and should be stricken.”)

<sup>12</sup> Brief at 2, ¶2; 3, ¶2; 5, ¶3; 6, ¶2.

inadmissible hearsay. Ohio Edison never had the opportunity to cross-examine the individuals with whom Complainant spoke to clarify or rebut the conversations, if they indeed happened as Complainant alleges. The articles Complainant references are no different. Complainant admits that he found them via a Google search and did nothing to authenticate them during the proceeding.<sup>13</sup> Ohio Edison also never received the opportunity to cross-examine the authors of these statements and did not have the opportunity to present evidence in response.

Accordingly, the conversations Complainant had with his brother and current and former Ohio Edison employees, along with the articles provided by Complainant in support of his Brief are inadmissible hearsay and should be stricken.

### **III. CONCLUSION**

For these reasons, the Commission should strike the aforementioned portions of Complainant's Brief.

Dated: August 22, 2019

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<sup>13</sup> Hearing Tr. at 15:5-23 (referencing articles found on Google about which Complainant has no personal knowledge); *id.* at 63:10-64:21 (excluding unauthenticated article as hearsay).

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Ohio Edison Company's Post-Hearing Brief was served via electronic mail, upon the following on this 22nd day of August 2019.

Matt Kubitza  
mkubitza@apvcoatings.com

/s/ Casteel E. Borsay  
An Attorney for Ohio Edison Company



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Casteel E. Borsay on behalf of Ohio Edison Company