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To:	PUCO Docketing	**Date:**	April 10, 2007
Firm:		**From:**	Kathy J. Kolich, Esquire
Fax #:	614/466-0313	**Pages:**	10 (including cover page)

Subject: Re: Case No. 05-796-EL-CSS
Motion to Strike Complainant's Second Application for Rehearing and Memorandum in Support

Comments: Following is the Motion to Strike Complainant's Second Application for Rehearing and Memorandum in Support regarding the above case. The original and the required number of copies will be sent via overnight mail for delivery Wednesday, April 11, 2007. Please call me if you have any questions. Thank you.

IF YOU DO NOT RECEIVE ALL OF THE PAGES MENTIONED ABOVE, PLEASE CALL CONFIRMATION NO. 330/384-4580 or 330/384-5801.

[21842]

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Kathy J. Kolich
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Via Federal Express
and Facsimile (614-466-0313)

April 10, 2007

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: ***Motion to Strike Complainant's Second Application for Rehearing***
Elyria Foundry v. Ohio Edison Company
Case No. 05-796-EL-CSS

Enclosed for filing, please find the original and twelve (12) copies of the *Motion to Strike Complainant's Second Application for Rehearing* and Memorandum in Support regarding the above-referenced case. Please file the enclosed *Motion*, time-stamping the two extras and returning them to me in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions.

Very truly yours,

Kathy J. Kolich

kag
Enclosures

cc: Parties of Record

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

Elyria Foundry Company,	)	
	)	
Complainant,	)	
	)	
v.	)	CASE NO. 05-796-EL-CSS
	)	
Ohio Edison Company,	)	
	)	
Respondent.	)	

MOTION TO STRIKE COMPLAINANT'S SECOND APPLICATION FOR REHEARING

For the reasons set forth in the attached memorandum in support, Respondent, Ohio Edison Company, respectfully asks this Commission to strike Complainant's second application for rehearing which was filed on April 4, 2007.

Respectfully submitted,

/Kathy J. Kolich/

Kathy J. Kolich (Reg. No.0038855)
Senior Attorney
FirstEnergy Service Company
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On behalf of Ohio Edison Company

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

I. Introduction.

Respondent, Ohio Edison Company, moves to strike Complainant's second application for rehearing because it raises nothing not already argued by Complainant in its initial brief (at pages 9-25), argued in its reply brief (at pages 8-23), argued in its memorandum in support of its first application for rehearing (at pages 22-28), considered by the Commission in its Opinion and Order (at pages 8-10) and reconsidered by the Commission in its Entry on Rehearing (at page 7.) Nothing in Ohio law permits Complainant to continue to argue the same issue simply because the Commission disagrees with Complainant's position. Enough is enough. It is time to put this complaint to rest. Accordingly, for the reasons discussed below, Respondent, Ohio Edison Company, respectfully asks this Commission to strike from the record Complainant's second application for rehearing.

II. Argument

On June 20, 2005, Complainant, Elyria Foundry Company ("Elyria Foundry") filed a complaint against Respondent, Ohio Edison Company ("Ohio Edison") alleging, among other things, that "Ohio Edison improperly defines its incremental costs to supply Elyria Foundry and, therefore, unreasonably and incorrectly prioritizes service to its various customers." (Order, p. 8.) After the parties submitted initial and reply briefs, the Commission, on January 17, 2007, issued its Opinion and Order in the instant proceeding. In its Order, the Commission found in favor of Ohio Edison on all counts. On February 16, 2007, Elyria Foundry filed an Application for Rehearing ("AFR I") in which it submitted 22 assignments of error, five of which dealt with the allocation of

purchased power costs under a Power Supply Agreement ("PSA") between FirstEnergy Solutions Corp. and Ohio Edison. (EF AFR I, Grounds 16-20.) On March 14, 2007, the Commission issued its Entry on Rehearing in which it rejected all of Elyria Foundry's assignments of error set forth in its AFR I, including those pertaining to cost allocation under the PSA. On April 4, 2007, Complainant, in total disregard of the well established statutory procedure for review of Commission orders, filed a second Application for Rehearing ("AFR II"). In its AFR II, Complainant does not argue that the Commission, in its Entry on Rehearing, raised any new issue not previously addressed by the Commission. Rather, Complainant simply whines, yet again, because the Commission does not interpret the PSA as argued by Complainant.[1] As is discussed below, Complainant's AFR II is improper and should be stricken from the record. Anything less could allow Complainant to circumvent the statutory deadlines with which Complainant must comply in order to notice an appeal and to preserve an issue for appeal.

A. Complainant's AFR II Raises Nothing Not Already Addressed and Rejected by the Commission and is, Therefore, Improper.

The Ohio Revised Code sets forth the procedures under which Commission orders can be reviewed. And these procedures certainly do not include a second application for rehearing simply because the Commission disagrees with the arguments set forth by a party in its initial application for rehearing. Revised Code Section 4903.10 expressly provides in pertinent part:

[1] Complainant also alleges a violation of R.C. 4903.09. As discussed *infra* in Section II (B), Complainant's allegation is improper and it too must be stricken from the record.

> After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in said proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.
>
> * * *
>
> No cause of action arising out of any order of the commission, ... shall accrue in any court to any ... corporation unless such ... corporation has made a proper application to the commission for a rehearing.

The Commission's Order in this proceeding was journalized on January 17, 2007. In that Order, the Commission addressed all issues raised on brief by the parties, including the issue of purchased power cost allocation under the PSA. (Order, pp. 8-10.) Pursuant to R.C. 4903.10, Complainant timely filed its AFR I in which it raised, among its 22 assignments of error, five assignments of error related to the allocation of purchased power costs under the PSA. (Elyria Foundry AFR I, Grounds 16-20.) The Commission again rejected Complainant's position, including its interpretation of the PSA, and denied Complainant's AFR I. As Complainant's AFR II demonstrates, Complainant submitted AFR II simply because it believes that the Commission erred in not granting rehearing on Assignments of Error 16-20. (EF AFR II, Memo in Support, p.1.) Complainant's recourse, however, no longer lies with the Commission. To find otherwise would create a precedent under which any party could prolong a case before the Commission indefinitely. The Ohio Revised Code sets forth a specific statutory process for review of Commission orders. Pursuant to R.C. 4903.10 and R.C. 4903.11, if Complainant believes that the Commission's denial of its request for rehearing constitutes error, its recourse now lies with the Ohio Supreme Court. It has exhausted its remedies before the Commission. The AFR II is improper and must be stricken.

B. Complainant's Alleged Violation of R.C. 4903.09 is Improper and Must be Stricken.

Revised Code Section R.C. 4903.10 makes it clear that issues raised in a *proper* application for rehearing are the only issues that can be the subject of any appeal to the Ohio Supreme Court. As already explained *supra*, Complainant's AFR II is improper. If the Commission entertains Complainant's AFR II, it would allow Complainant to circumvent the statutory appellate process and preserve an issue for appeal that was not timely raised in its AFR I.

In its AFR II, Complainant raises for the first time a claim that the Commission's Entry on Rehearing violates R.C. 4903.09 because, according to Complainant, "the Commission failed to reveal the factual basis and reasoning used to *reject* Elyria Foundry's *argument*, and for its agreeing with Ohio Edison." (EF AFR II, Memo in Support, p. 2.) (italics added.) As a preliminary matter, Complainant misinterprets R.C. 4903.09. Nowhere in this statute is the Commission required to explain why it *rejected* a position. Nor is it required to address each and every *argument* raised by a party. Rather, R.C. 4903.09 requires the Commission to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." As the Ohio Supreme Court explained in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n* (1983), 4 Ohio St. 3d 107, 110, the purpose of this statute is to provide the Court with sufficient details to enable it to determine, upon appeal, how the Commission reached its decision. The details need to be sufficient to determine the basis for the Commission's reasoning. *Payphone Ass'n. of Ohio v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 461, 2006-Ohio-2998, ¶ 32, setting forth "some factual basis and reasoning

based thereon in reaching its conclusion." *Allnet Communications Serv., Inc. v. Pub. Util. Comm'n* (1994), 70 Ohio St. 3d 202, 209.

The alleged R.C. 4903.09 violation goes to the Commission's denial of rehearing of Complainant's Assignments of Error 16-20, all of which deal with cost allocation under the PSA. (EF AFR II, Memo in Support, p. 2.) Contrary to Complainant's assertions, the Commission explained its rationale in support of its decision on this issue in its Order at pages 8-10. The Commission is not required to reiterate in a subsequent entry on rehearing its analysis on issues already addressed. Moreover, the Commission, although not required to do so, did indeed explain its rationale for rejecting Complainant's only new argument raised in its AFR I (dealing with the mathematical pro rata allocation of costs based on the percentage of power consumed by Ohio Edison customers), indicating that it agreed with the position set forth by Ohio Edison in its memorandum contra Complainant's AFR I. (Entry on Rehearing, p. 7.) Clearly the Commission's Entry on Rehearing, especially when read in conjunction with its Order, provides the Court with sufficient details to enable it to determine, upon appeal, how the Commission reached its decision.

In light of the foregoing, there is no violation of R.C. 4903.09. Complainant's reading of the Commission's Entry on Rehearing as well as its interpretation of R.C. 4903.09 is wrong. Complainant's error, however, should not give Complainant an opportunity to circumvent the statutory appellate process simply by raising a bogus issue in a bogus application for rehearing. Complainant's AFR II, including its alleged violation of R.C. 4903.09, is improper. It must be stricken in its entirety.

III. Summary

Complainant's AFR II focuses on the issue of cost allocation under the PSA. This issue was the subject of two days of hearing, initial and reply briefs, the Commission's Order and its Entry on Rehearing. There is no question that Complainant's arguments were considered by the Commission. The fact that the Commission rejected Complainant's position both after briefs and on rehearing does not give Complainant the right to ask the Commission to reconsider, yet again, Complainant's position -- especially when Complainant raises nothing new. Moreover, Complainant's allegation of a violation of R.C. 4903.09 totally ignores both the Commission's explanation in its Entry on Rehearing and the Ohio Supreme Court's interpretation of this statute. Whether intentional or simply due to Complainant's misunderstanding of the law and appellate procedure, the result is the same. To entertain Complainant's AFR II could result in Complainant circumventing the well established statutory procedures in place to take appeal and preserve issues for appeal. Complainant's shenanigans must not be condoned. It is time to put this proceeding to rest. Complainant's second application for rehearing is improper and unlawful and must be stricken in its entirety from the record.

Respectfully submitted,

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Phone: 330-384-4580
Fax: 330-384-3875

On behalf of Ohio Edison Company

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Motion to Strike and Supporting Memorandum was served upon Craig I. Smith, Attorney at Law, 2824 Coventry Road, Cleveland, Ohio 44120 by regular U.S. Mail, postage prepaid, this 10th day of April, 2007.

Respectfully submitted,

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