

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric) Case No. 07-551-EL-AIR
Illuminating Company, and The Toledo Edison) Case No. 07-552-EL-ATA
Company for the Authority to Increase Rates) Case No. 07-553-EL-AAM
for Distribution Service, Modify Certain) Case No. 07-554-EL-UNC
Accounting Practices and for Tariff Approvals.)

**MOTION OF THE OHIO SCHOOLS COUNCIL TO STRIKE
PORTIONS OF IEU-OHIO'S REPLY BRIEF, OR,
IN THE ALTERNATIVE, FOR LEAVE TO FILE A SUR-REPLY**

On April 18, 2006, Industrial Energy Users-Ohio ("IEU-Ohio") filed its reply brief, in which it made detailed arguments for the first time against the Ohio Schools Council ("Schools"). Ohio law and Commission precedent is clear that the purpose of a reply brief is not to sandbag an opposing party with entirely new matter and new arguments so that the opposing party is left without an opportunity to respond. However, IEU-Ohio's reply brief constitutes an intentional attempt to put forward its only arguments regarding the Schools' positions with the knowledge that the Schools do not have the automatic right to reply. For the reasons set forth below, the Commission should sanction IEU-Ohio's misleading conduct by striking the portions of its reply brief addressing the Schools' arguments. In the alternative, the Commission should grant the Schools leave to file a sur-reply in this matter.

Under O.R.C. 4903.22, "all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4925. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions." Thus, parties to actions before the

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Public Utilities Commission of Ohio ("Commission") must abide by the same rules of practice as civil litigants in courts of this State.

Due process clearly entails an "opportunity to be heard." *Grannis v. Ordean* (1914), 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363, 1369. Further, the due process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *State ex rel. Canter v. Industrial Com. of Ohio* (1986), 28 Ohio St. 3d 377, 380, citing *Ohio Bell Telephone Co. v. Pub. Utilities Comm'n* (1937), 301 U.S. 292; *United States v. Abilene & S. R. Co.* (1924), 265 U.S. 274.

In *In re Regulation of the Elec. Fuel Component Contained within the Rate Schedules of the Ohio Power Company* (Ohio Pub. Util. Com. 1999), 1999 Ohio PUC LEXIS 128, the Commission considered a motion to strike certain portions of a reply brief filed by the Office of Consumers' Counsel ("OCC"). 1999 PUC LEXIS 128 at *60. The movant argued that it was entitled to the motion to strike because the OCC had included new material in its reply brief, and thereby failed to give the movant adequate time in which to explain and/or rebut the material to which it objected. *Id.* The Commission granted the movant's motion to strike, finding that the OCC's attempt to put forward new information at the eleventh hour undermined the movant's ability to explain and/or rebut the material. *Id.*

IEU-Ohio's assertion of an array of arguments contrary to the position of the Ohio Schools Council ("Schools") for the first time in its reply brief violates the Schools' due process right to be heard. IEU-Ohio's initial brief is fifteen pages long. IEU-Ohio devotes nearly every word of that initial brief to supporting the proposed stipulation before the Commission in this case; specifically the revenue distribution portion of the

stipulation. Out of these 15 pages supporting the reasonableness of the stipulation's recommended revenue distribution, IEU-Ohio spends a single sentence referencing the other issues in the stipulation including that it also recommends resolution of rate design and provides for several signatory parties to withdraw some of their objections to the Staff Reports. (IEU-Ohio Initial Brief, p. 4).

Out of the 15 pages of IEU-Ohio's initial brief, it references the Schools only once noting that the Schools, along with other parties, filed objections to the Staff Report on January 3, 2008. *Id.* at 2. However, IEU-Ohio *cannot* in response to this motion argue that it was not aware of the Schools positions at the time that it filed its initial brief. In fact, IEU-Ohio has known the position of the Schools since the Schools filed their objections in the case nearly four months prior to the date when initial briefs were due.

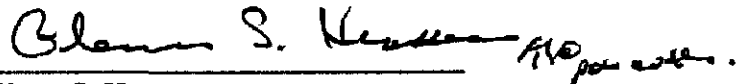
In its initial brief the Companies responded directly to the arguments and testimony of the Schools. By contrast, IEU-Ohio waited in the weeds to file a twenty-three page reply brief of which it spends twelve pages – nearly the length of its entire initial brief – addressing the objections of the Schools. Specifically, in its reply brief, IEU-Ohio argues for the first time against special school rates or a school rider; mentions for the first time the Companies' Cost of Service Study; disputes for the first time Mr. Solganick's testimony *for whom it had no questions during cross-examination* (Tr. IV, p. 12); attacks for the first time the Schools analysis, conclusions, recommendations to the Commission. (IEU-Ohio Reply Brief, p. 2- 13.)¹ As IEU-Ohio recognizes by repeatedly citing the pre-filed testimony of the Schools' witness, Mr. Solganick, the basis for the Schools' proposals, like the Schools objections, have been established from early on prior

¹ Without going into detail, the IEU-Ohio Reply Brief (e.g., at p. 9) is simply inaccurate and misleading. If not stricken, the Schools deserve an opportunity to file a response to correct the record.

to the hearing process, and provided IEU-Ohio a reasonable opportunity to review the Schools' interests, arguments, and positions and consider whether to either cross-examine the Schools' witness or respond to the Schools' positions in its initial brief.

IEU-Ohio strategically chose to wait to attack the Schools until its reply brief when the Schools would have no opportunity to respond. However, due process mandates that this approach is unjust and results in unfairness to all parties who have attempted to set forth all of their issues in their initial brief. This results in an unfair advantage, and should be dealt with by striking the portions of IEU-Ohio's reply brief, which, for the first time, address the arguments and positions of the Schools. Specifically, the Schools request that Section 1, pages 3 – 13, of IEU-Ohio's brief should be stricken from the record. In the alternative, the Schools respectfully request that the Commission grant the Schools leave to file a sur-reply to IEU-Ohio's reply brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion of the Ohio Schools Council to Strike Portions of IEU-Ohio's Reply Brief, or, in the Alternative, For Leave to file a Sur-Reply being served by electronic mail or personal delivery, as shown below, this 25th day of April 2008.



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