

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA  
THE OHIO SCHOOLS COUNCIL'S MOTION TO STRIKE

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April 30, 2008

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE  
OHIO SCHOOLS COUNCIL'S MOTION TO STRIKE**

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Pursuant to the schedule established by the Attorney Examiners in the above-captioned proceedings, initial briefs and reply briefs were filed at the Public Utilities Commission of Ohio ("Commission") on March 28, 2008 and April 18, 2008, respectively, by interested parties to the proceeding, including Industrial Energy Users-Ohio ("IEU-Ohio"). On April 25, 2008, the Ohio Schools Council ("OSC" or "Schools") filed a Motion to Strike Portions of IEU-Ohio's Reply Brief, or, in the Alternative, for Leave to File a Sur-Reply ("Motion to Strike"). The Motion to Strike was followed by an Errata Notice, filed on April 28, 2008, clarifying that OSC seeks to strike Section II(A)(1) of IEU-Ohio's Reply Brief, which begins on page 3 and ends on page 11. Pursuant to Rule 4901-1-12(B)(1), Ohio Administrative Code, IEU-Ohio hereby files this Memorandum Contra OSC's Motion to Strike.

OSC argues that Section II(A)(1) of IEU-Ohio's Reply Brief should be stricken from the record, or, in the alternative, that OSC be granted leave to file a sur-reply to IEU-Ohio's Reply Brief, inasmuch as OSC alleges that "IEU-Ohio strategically chose to

wait to attack the Schools until its reply brief when the Schools would have no opportunity to respond.” Motion to Strike at 4. OSC reasons that IEU-Ohio’s arguments in its Reply Brief that are contrary to the position of the OSC violates OSC’s due process right to be heard, and that while the Companies<sup>1</sup> responded directly to the arguments and testimony of the Schools, “IEU-Ohio waited in the weeds to file a twenty-three page reply brief of which it spends twelve pages<sup>2</sup>—nearly the length of its entire initial brief – addressing the objections of the schools.” *Id.* at 2.

While IEU-Ohio may not have argued against the anticipated arguments of OSC in its Initial Brief, IEU-Ohio presented and argued its support of the Stipulation and Recommendation (“Stipulation”), filed with the Commission on February 11, 2008, and which proposes a rate design that does not contemplate special rates for the schools or any other class of customers. IEU-Ohio is not required to respond to arguments anticipated by other parties to a proceeding as OSC seems to suggest. Indeed, while parties may be afforded the luxury of presuming arguments based on stakeholder objections and their listing of issues in a rate case, it is not a foregone conclusion that those arguments will in fact continue to be at issue after the presentation of evidence.

Consequently, IEU-Ohio’s Reply Brief appropriately responded to OSC’s Initial Brief, which alleged that OSC was “bullied” by the Stipulation’s rate design implications, and which then led OSC to propose and discuss its own alternatives. OSC Initial Brief

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<sup>1</sup> As defined throughout the proceedings, “Companies” refers to Ohio Edison Company (“OE”), The Toledo Edison Company (“TE”) and The Cleveland Electric Illuminating Company (“CEI”).

<sup>2</sup> Given OSC’s Notice of Errata, filed April 28, 2008, IEU-Ohio assumes that the actual number of pages that OSC refers to is actually eight pages long, rather than twelve, inasmuch as the entire Section II(A)(1) that OSC moves to strike is only eight pages.

at 22-27.<sup>3</sup> Thus, the matters that IEU-Ohio addressed in its Reply Brief were in direct response to OSC's allegations and claims raised in OSC's Initial Brief. Indeed, IEU-Ohio cited all of the portions and arguments within OSC's Initial Brief to which IEU-Ohio responded.

In addition, contrary to the cases cited by OSC in support of its Motion to Strike, IEU-Ohio's Reply Brief does not propose that the Commission consider evidence not already admitted into the record.<sup>4</sup> Rather, the support for IEU-Ohio's arguments that respond to OSC's Initial Brief arguments were derived from the record evidence. There is nothing sinister, inappropriate, or unconstitutional about IEU-Ohio's use of record evidence to rebut the claims made in OSC's Initial Brief. Moreover, each party must determine how to best support its position and IEU-Ohio was satisfied with the development of the record and, therefore, the fact that IEU-Ohio chose not to cross-examine OSC's witness does not render IEU-Ohio's Reply Brief invalid or inappropriate. Further, OSC's feigned surprise that IEU-Ohio chose to rebut arguments advanced by OSC in their Initial Brief is a red herring. IEU-Ohio has been a signatory supporter of the

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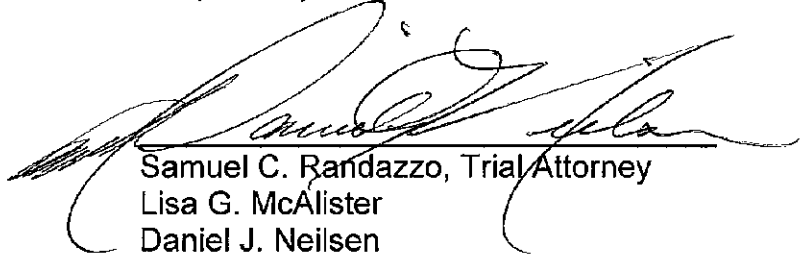
<sup>3</sup> OSC argues at page 22 of its Initial Brief that it objects to the terms of the Stipulation and the elimination of school-specific rates, and then on page 23, goes on to propose its own alternatives, based on its foregoing argument.

<sup>4</sup> In *State ex rel. Canter v. Industrial Com. of Ohio*, 28 Ohio St.3d 377 at 380 (1986), the Ohio Supreme Court found that presenting a report as evidence after the conclusion of an Industrial Commission hearing could not be considered without contravening the appellant's constitutional rights. In *Ohio Bell Telephone Co. v. Pub. Utilities Com. of Ohio*, 301 U.S. 292 at 300-301 (1937), the U.S. Supreme Court held that a party is precluded from due process when a Commission considers and relies upon findings not in evidence and which was being admitted through judicial notice after the case had already been submitted. Likewise, in *U.S. v. Abilene & S.R. Co.*, 265 U.S. 274 at 288 (1924), the U.S. Supreme Court held that information obtained during an Interstate Commerce Commission ("ICC") investigation, but which was not entered into the record as evidence rendered the subsequent ICC Order that relied on the obtained information void. Finally, in *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Ohio Power Company and Related Matters*, PUCO Case Nos. 98-101-EL-EFC et al., Opinion and Order at 26 (May 26, 1999), the Commission granted Ohio Power Company's and Columbus Southern Power Company's Motion to Strike a portion of the Ohio Consumers' Counsel's ("OCC") Reply Brief that introduced and referred to the results of a USEPA 1999 emission allowance auction that had not been admitted or introduced prior to the filing of the OCC's Reply Brief.

Stipulation since it was presented to the Commission on February 11, 2008 and IEU-Ohio made clear in its Initial Brief that it supported the rate design proposed in the Stipulation, which does not contemplate a special rate for the schools. Thus, OSC had ample notice that IEU-Ohio had taken an adverse position to OSC in this proceeding.<sup>5</sup>

For the foregoing reasons, IEU-Ohio respectfully urges the Commission to deny OSC's Motion to Strike portions of IEU-Ohio's Reply Brief, or in the Alternative, for Leave to File a Sur-Reply.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to Samuel C. Randazzo, is written over the typed name and address.

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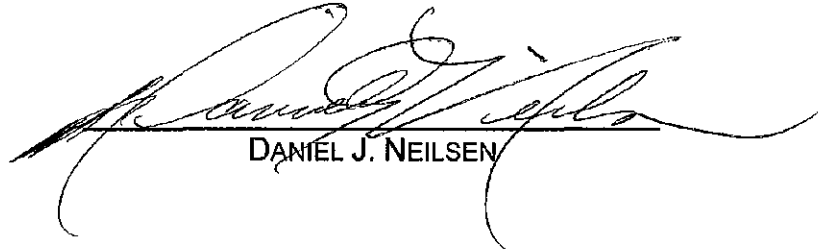
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<sup>5</sup> Paragraph 13 of the Stipulation provides in part that "The Signatory Parties agree to support this Stipulation before the Commission and urge its acceptance and approval of this Stipulation, including identifying such support through Briefs filed in this Proceeding." Since OSC opposes the Stipulation in its Initial Brief, the fact that IEU-Ohio chose to rebut arguments advanced by OSC as to why the Stipulation is not just and reasonable was clearly a possibility.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS- OHIO'S MEMORANDUM CONTRA THE OHIO SCHOOLS COUNCIL'S MOTION TO STRIKE*, was served upon the following parties of record this 30<sup>th</sup> day of April 2008, via electronic transmission or hand delivery as directed by the Attorney Examiners.



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