

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company and The Toledo)	
Edison Company for Authority to)	Case No. 12-1230-EL-SSO
Establish a Standard Service Offer)	
Pursuant to R.C. § 4928.143 in the Form)	
of an Electric Security Plan.)	

**REPLY MEMORANDUM
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On August 17, 2012, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Take Administrative Notice in this proceeding. On August 27, 2012, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy" or "Utilities") filed the Memorandum Contra OCC Motion to Take Administrative Notice ("Late-filed Memo Contra") one business day after the filing deadline.¹ On August 30, 2012, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Strike the Memorandum Contra filed on August 27, 2012, FirstEnergy. On September 4, 2012-- and within the established filing deadline -- FirstEnergy filed a Memorandum Contra Motion to Strike. OCC takes this opportunity to respond to the arguments raised by FirstEnergy in their Memorandum Contra Motion to Strike ("Memo Contra").

¹ See Entry at ¶7 (April 19, 2012).

II. ARGUMENT

FirstEnergy filed its Late-filed Memo Contra out of time based upon the Attorney Examiner's April 19, 2012 Entry. The Commission should disregard FirstEnergy's arguments to the contrary and grant OCC's Motion to Strike the late-filed pleading.

There is no dispute that on April 19, 2012, the Attorney Examiner established a procedural schedule and certain timelines for the filing of certain pleadings.² FirstEnergy in the Memo Contra acknowledges the procedural Entry that established the deadlines for filing Memoranda Contra and Replies to Memoranda Contra.³ The conflict, according to FirstEnergy, is whether the established deadlines remain in place. FirstEnergy argues the established filing deadlines are no longer applicable because "the expressed concern for hearing had long since passed."⁴ It is interesting to note that this argument is made without the benefit of citation to an Entry from the Attorney Examiner announcing the established deadlines are no longer applicable in this proceeding. Therefore, FirstEnergy has unilaterally decided when to file its Memorandum Contra to OCC's Motion to Take Administrative Notice, and it did so at its own risk of it being stricken.

The Commission's rules provide for this eventuality. Ohio Adm. Code 4901-1-13 permits a party to seek an extension for the filing of a pleading. However, that rule requires a Motion and the showing of good cause.⁵ FirstEnergy did neither.

Instead, FirstEnergy has employed a strategy to turn its own violation of the Commission's rules and the Attorney Examiner's Entry back on the non-violating party --

² See Entry at ¶7 (April 19, 2012).

³ Memo Contra at 3 (August 4, 2012).

⁴ Id.

⁵ Ohio Adm. Code 4901-1-13.

OCC.⁶ There have been a couple of recent Commission decisions that should cause the Commission to upend FirstEnergy's strategy. First, in another electric utility's energy efficiency case, the Commission showed significant frustration with that utility's failure to follow the Commission's rules.⁷ Second, almost the exact same fact pattern existed in the recent American Electric Power ("AEP") electric security plan ("ESP"), in which the Commission granted OCC/Appalachian Peace and Justice Network's ("APJN") Motion to Strike FirstEnergy Solution's Memorandum Contra OCC/APJN's Motion to Take Administrative Notice that had been filed out of time.⁸ Therefore, the Commission should strike FirstEnergy's Late-filed Memo Contra.

Finally, it is interesting to note that the Memo Contra to OCC's Motion to Strike was filed by FirstEnergy within the established filing deadlines in this proceeding -- "within five business days."⁹ The timing of filing of that pleading was done without explanation by FirstEnergy. It is unclear why the Memo Contra being replied to herein was not filed under the Ohio Administrative Codes default rules regarding the timelines of memoranda contra and other filings --such as rules 4901-1-35 and 4901-1-12 that FirstEnergy argues "should control"¹⁰ the timing of its pleading OCC moved to strike. The Commission should not lose focus on FirstEnergy's inconsistent behavior and the twisted logic being used to justify its actions in this proceeding.

⁶ Memo Contra at 5 (August 4, 2012). (FirstEnergy argues that "at most they were 1 business day late.").

⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Entry at ¶7 (May 9, 2012).

⁸ *In the Matter of the application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*. Case No. 11-346-EL-SSO, et al., Opinion and Order at 12 (August 8, 2012).

⁹ See Entry at ¶7 (April 19, 2012).

¹⁰ Memo Contra at 3 (August 4, 2012).

III. CONCLUSION

The Commission should grant OCC's Motion to Strike FirstEnergy's Memo Contra that was filed late based on the filing deadlines established by the Attorney Examiner in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Memorandum by the Office of the Ohio Consumers' Counsel* was served via electronic mail upon the following persons on this 7th day of September 2012.

/s/ Larry S. Sauer

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9/7/2012 3:01:20 PM

in

Case No(s). 12-1230-EL-SSO

Summary: Reply Reply Memorandum by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.