

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ohio</b>	)	
<b>Edison Company, The Cleveland Electric</b>	)	
<b>Illuminating Company, and The Toledo</b>	)	<b>Case No. 14-1297-EL-SSO</b>
<b>Edison Company for Authority to Provide for</b>	)	
<b>a Standard Service Offer Pursuant to R.C.</b>	)	
<b>4928.143 in the Form of An Electric Security</b>	)	
<b>Plan</b>	)	

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S MOTION TO STRIKE  
PORTIONS OF THE INITIAL BRIEF OF THE OHIO MANUFACTURERS’  
ASSOCIATION ENERGY GROUP**

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Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portions of the Initial Brief of the Ohio Manufacturers’ Association Energy Group (“OMAEG”):

1. Page 52, Line 14 beginning with the word “Specifically” and continuing through Page 54, Line 19 ending with the word “costs”;
2. Page 55, Line 1 beginning with the word “Rather” and continuing through Line 4;
3. Page 71, Line 13 beginning with the word “One” and continuing through Line 14;
4. Page 72, Line 8, Footnote 368;
5. Page 72, Line 10 beginning with the word “It” and continuing through Line 11;
6. Page 73, Line 3 beginning with the word “CPA and continuing through the end of Line 4 and including Footnote 370;
7. Page 73, Line 7 beginning with the word “Providing” and continuing through Line 13; and
8. Page 73, Line 15 beginning with the word “CPA” and continuing through Line 16 ending with the word “party”.

The Commission should strike this material from OMAEG's brief because OMAEG improperly quoted and discussed inadmissible testimony contained in Exhibit 1 to the Supplemental Testimony of Matthew White and Attachment A to OMAEG Exhibit 19. The Commission should also strike this material because OMAEG referenced and discussed testimony of OMAEG witness Edward Hill that the Attorney Examiner excluded from the record.

For these reasons and those set forth in the attached memorandum in support, which is incorporated herein, the Commission should grant this motion and strike the portions of OMAEG's brief listed above.

Date: February 26, 2016

Respectfully submitted,

/s/ David A. Kutik

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TOLEDO EDISON COMPANY

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<b>a Standard Service Offer Pursuant to R.C.</b>	)	
<b>4928.143 in the Form of An Electric Security</b>	)	
<b>Plan</b>	)	

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**MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT  
OF MOTION TO STRIKE PORTIONS OF THE INITIAL BRIEF OF THE  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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**I. INTRODUCTION**

OMAEG's Initial Brief should be stricken in two parts. First, OMAEG improperly relies on testimony from its witness Hill, testimony that the Attorney Examiner excluded from evidence. (OMAEG Br. at 71-74). Second, OMAEG quotes and discusses purported testimony of Leila Vespoli before the House Public Utilities Committee and the Senate Utilities Committee of the Ohio House of Representatives that is contained in Exhibit 1 to the Supplemental Testimony of Matthew White ("MW Exhibit 1") and EWH Supplemental Attachment A to OMAEG Exhibit 19 ("EWH Supplemental Attachment A"). But none of this purported testimony contained in either Exhibit 1 or EWH Supplemental Attachment A was authenticated at the hearing. This failure makes the purported testimony inadmissible. The Commission should accordingly strike OMAEG's discussion of Ms. Vespoli's purported testimony from pages 52 through 55 of its brief.

## II. ARGUMENT

### A. OMAEG improperly relies on testimony that the Attorney Examiner excluded from the record.

On pages 71 through 74 of its brief, OMAEG relies on the excluded testimony of Dr. Hill regarding the Consumer Protection Association. OMAEG, however, lost its argument to introduce this evidence into the record at the hearing. The Attorney Examiner found the information was outside of the scope of cross examination. (OMAEG Br. at 72 citing Hearing Tr. Vol. XXXIX at 8393). OMAEG acknowledges this ruling in its brief. (*Id.*)

OMAEG nonetheless uses its brief as an improper second chance to introduce Dr. Hill's testimony and related "new information" regarding the Consumer Protection Association into the record and then rely on that information to "support" its arguments.<sup>1</sup> The Commission has rejected prior efforts of parties to include information in a brief that is not part of the record. *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, 2006 WL 3932766, at \*1 (Opinion and Order dated November 21, 2006, at 3) (granting motion to strike and holding that "[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."). The Commission has explained, "[I]f 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 to refute statements contained in the document." *Id.* The same concerns apply to OMAEG's reliance on Dr. Hill's excluded testimony and its references to material regarding the Consumer Protection Association. As such,

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<sup>1</sup> Indeed, OMAEG goes even one step further and requests that the Commission reopen the record to accept additional evidence regarding the topic. (OMAEG Br. at 74).

the Commission should reject OMAEG's improper attempt to introduce this information into the record via its post-hearing brief.

To be sure, OMAEG argues that that Rule 4901-1-15(F) of the Ohio Administrative Code allows it to raise the propriety of the Attorney Examiner's ruling "in its initial brief as a *distinct issue* for the Commission's consideration." (OMAEG Br. at 72 (emphasis added)). But OMAEG's discussion of Dr. Hill's testimony is not limited to a distinct argument regarding the propriety of the Attorney Examiner's evidentiary ruling.<sup>2</sup> Instead, under its argument sub-heading "The Stipulated ESP IV is not the product of serious bargaining among capable, knowledgeable parties,"<sup>3</sup> OMAEG argues at length regarding how Dr. Hill's testimony and information regarding the Consumer Protection Association bear on the three prongs of the Commission's test for assessing a stipulation. (OMAEG Br. at 72-73). OMAEG then relies on this information to draw a conclusion regarding the propriety of the Consumer Protection Association's participation in the Stipulation. (OMAEG Br. at 73 (Lines 7-13 and 15-16)). Thus, OMAEG's discussion and reference to the information is by no measure limited to the distinct issue of whether the Attorney Examiner erred by finding Dr. Hill's testimony on redirect regarding the Consumer Protection Association was outside the scope of his earlier cross examination.

OMAEG's discussion and reliance on the portions of Dr. Hill's testimony that the Attorney Examiner excluded from the record to "support" its arguments regarding the Stipulation is wholly inappropriate. This information is not part of the record and cannot offer any such

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<sup>2</sup> OMAEG merely contends that the Attorney Examiner erred by granting the motion to strike because it argues (without any support) that "the information provided was well within the scope of cross examination." (OMAEG Br. at 72).

<sup>3</sup> The Companies refute this argument in their Reply Brief. (Company Reply at Section II).

“support.” Thus, the Commission should limit OMAEG’s discussion of this material to the “distinct issue” regarding whether the Attorney Examiner correctly ruled that Dr. Hill’s testimony regarding the Consumer Protection Association was outside the scope of cross examination. The Commission should strike the portions of OMAEG’s brief in which OMAEG uses Dr. Hill’s testimony and the related information to support its arguments regarding the Stipulation.<sup>4</sup>

**B. OMAEG improperly quotes from unauthenticated exhibits.**

On pages 52 through 55, OMAEG quotes purported testimony of Leila Vespoli before the House Public Utilities Committee contained in MW Exhibit 1 and purported testimony of Ms. Vespoli before the Senate Utilities Committee of the Ohio House of Representatives contained in EWH Supplemental Attachment A. The purported testimony in MW Exhibit 1 and EWH Supplemental Attachment A, however, was never authenticated pursuant to the Ohio Rules of Evidence. It was not signed by Ms. Vespoli. And it was devoid of any indication of its provenance. IGS witness White admitted that the document in MW Exhibit 1 was provided to him by counsel for IGS and that at the time he drafted his testimony and testified at deposition, he did not know where his counsel had obtained it. (Hearing Tr. Vol. XXV at 5099). OMAEG witness, Dr. Hill, offered no information at the hearing, other than a purported certified copy of the legislative committee testimony to attempt to authenticate the document contained in EWH Supplemental Attachment A. (Hearing Tr. Vol. XXVI at 5411). And counsel for OMAEG did not seek to admit the purportedly certified copy of Ms. Vespoli’s testimony as a separate exhibit.

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<sup>4</sup> The specific portions of OMAEG’s brief that the Commission should strike are: Page 71, Line 13 beginning with the word “One” and continuing through Line 14; Page 72, Line 8, Footnote 368; Page 72, Line 10 beginning with the word “It” and continuing through Line 11; Page 73, Line 3 beginning with the word “CPA and continuing through the end of Line 4 including Footnote 370; Page 73, Line 7 beginning with the word “Providing” and continuing through Line 13; and Page 73, Line 15 beginning with the word “CPA” and continuing through Line 16 ending with the word “party.”

At hearing on October 7, 2015, the Companies moved to strike MW Exhibit 1 and the testimony relying upon it from Mr. White's Supplemental Testimony because, among other reasons, the exhibit lacked proper authentication. (Hearing Tr. Vol. XXV at 5017-5019).<sup>5</sup> After lengthy arguments, the Attorney Examiners denied the Companies' motion to strike, finding that Ms. Vespoli's purported testimony was *relevant* to the case. (Hearing Tr. Vol. XXV at 5035-5036). The Attorney Examiners did not note the evidentiary support they had found for the authenticity of the document.

During cross examination, the Companies renewed their motion to strike MW Exhibit 1 and the testimony relying upon it after establishing that Mr. White received the document from counsel and that he was not aware of from where the document was obtained at the time he prepared his testimony. (Hearing Tr. Vol. XXV at 5099-5105). In response to the Companies' motion, counsel for IGS relied exclusively upon the purportedly certified copy of Ms. Vespoli's testimony to argue the authenticity of MW Exhibit 1. (Hearing Tr. Vol. XXV at 5105-5106). The Attorney Examiners denied the motion to strike, noting their reliance on their prior ruling. (Hearing Tr. Vol. XXV at 5107). Again, despite relying solely on the purportedly certified copy of Ms. Vespoli's testimony in an attempt to establish MW Exhibit 1's authenticity, IGS did not seek to move that copy into evidence. (Hearing Tr. Vol. XXV at 5128).

At hearing on October 13, 2015, the Companies moved to strike the portion of EWH Supplemental Attachment A containing Ms. Vespoli's purported testimony, as well as the portion of Dr. Hill's Second Supplemental Testimony relying upon it, on authentication grounds,

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<sup>5</sup> As indicated in the hearing transcript, the Companies specifically moved to strike MW Exhibit 1 and the portion of Mr. White's Supplemental Testimony beginning with the word "However" at Page 7, Line 19 and continuing through Page 9, Line 2.



among others.<sup>6</sup> The Attorney Examiners denied the motion to strike, finding that the testimony was relevant. As with their decision in relation to MW Ex. 1, the Attorney Examiners did not note the evidentiary support they had found for the authenticity of the document.

It is elementary that a condition precedent to admissibility is the authentication or identification of evidence. Evid.R. 901(A)<sup>7</sup>; *Seringetti Const. Co. v. City of Cincinnati*, 51 Ohio App. 3d 1, 9, 553 N.E.2d 1371 (Ohio Ct. App. 1988) (citing *Steinle v. Cincinnati* (1944), 142 Ohio St. 550, 53 N.E.2d 800) (“[P]roof of a writing's execution and authenticity is required as a condition precedent to its admission into evidence.”). To be sure, extrinsic evidence of authenticity is not required in all instances. *See* Evid.R. 902 (enumerating categories of self-authenticating documents). But all evidence must be authenticated in some manner.

The Commission follows the evidentiary rule that authentication is a condition precedent to admissibility. *See, e.g., Westside Cellular, Inc. v. New Par Companies*, Case No. 93-1758-RC-CSS, 2001 WL 1018827 (April 26, 2001) (denying application for rehearing of attorney examiner's decision to exclude evidence because such evidence was not properly authenticated, among other reasons); *In Re Petition of Ben Donahue & Numerous Other Subscribers of the N. Jackson Exch. of Ameritech Ohio, Complainants*, Case No. 97-718-TP-PEX, 1997 WL 34879135 (Nov. 4, 1997) (finding that certain evidence could be presented at hearing as long as the “evidence is authenticated properly”). Indeed, in this very proceeding, the Attorney Examiners have sustained numerous objections and excluded evidence on several occasions for failures to

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<sup>6</sup> The Companies specifically moved to strike (i) EWH Supplemental Attachment A pages 84 to 93 and (ii) Dr. Hill's Second Supplemental Testimony beginning at Page 28, Line 17 and continuing through Page 29, Line 3 and (iii) footnote 45 of the Second Supplemental Testimony. Pages 91 through 93 of EWH Supplemental Attachment A contained two newspaper articles, which were both cited in footnote 45. These articles and the portion of footnote 45 citing them were stricken by the Attorney Examiners as hearsay.

<sup>7</sup> Evid.R. 901(A) provides: “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

authenticate certain documents. (*See, e.g.*, Hearing Tr. Vol. I at 145; Hearing Tr. Vol. II at 358; Hearing Tr. Vol. XX at 3870-3871).

There is no foundation in the record to authenticate either Ms. Vespoli's purported testimony in MW Exhibit 1 or Ms. Vespoli's purported testimony in EWH Supplemental Attachment A. Neither document is self-authenticating. See Evid.R. 902. And neither Mr. White nor Dr. Hill did anything to authenticate the documents when they prepared their prefiled testimony, thereby failing to satisfy the foundational requirements of Rule 901. The actions of IGS and OMAEG prove the authentication failures of these documents as filed. Bringing purportedly certified or self-authenticating copies of the legislative committee testimony to hearing was nothing if not a tacit admission that the filed version of MW Exhibit 1 and the at-issue portion of EWH Supplemental Attachment A would be impossible to authenticate and move into evidence. Indeed, counsel for IGS based his authentication argument with respect to MW Exhibit 1 entirely upon the copy of the document Mr. White brought to the stand, which was never admitted into evidence. (Hearing Tr. Vol. XXV at 5105-5106). And no testimony was offered at hearing to support the authentication of the as-filed version of the at-issue portion of EWH Supplemental Attachment A.

Accordingly, OMAEG's extensive quotation and reliance on unauthenticated information contained in MW Exhibit 1 and EWH Supplemental Attachment A should be excluded from its brief. The Commission should grant the Companies' motion to strike this material.<sup>8</sup>

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<sup>8</sup> The specific portions of OMAEG's brief that the Commission should strike are: Page 52, Line 14 beginning with the word "Specifically" and continuing through Page 54, Line 19 ending with the word "costs"; and Page 55, Line 1 beginning with the word "Rather" and continuing through Line 4.

### III. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' motion to strike.

Date: February 26, 2016

Respectfully submitted,

/s/ David A. Kutik

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing motion was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26th day of February, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik  
David A. Kutik

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Summary: Motion to Strike Portions of the Initial Brief of OMAEG electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company