

**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       ) Case No. 14-1297-EL-SSO  
Authority to Provide for a Standard Service Offer   )  
Pursuant to R.C. §4928.143 in the Form of an       )  
Electric Security Plan.                                       )

---

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
MEMORANDUM CONTRA FIRST ENERGY'S  
MOTION TO STRIKE**

---

Glenn S. Krassen (Reg. No. 0007610)  
Counsel of Record  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (216) 523-7071  
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)  
Dylan F. Borchers (Reg. No. 0090690)  
BRICKER & ECKLER, LLP  
100 South Third Street  
Columbus, OH 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
dstinson@bricker.com  
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO  
PUBLIC ENERGY COUNCIL

**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 Provide for a Standard Service Offer	)	Case No. 14-1297-EL-SSO
Pursuant to R.C. §4928.143 in the Form of an	)	
Electric Security Plan.	)	

---

**MEMORANDUM CONTRA FIRST ENERGY’S**

---

**I. INTRODUCTION**

By motion filed February 26, 2016, FirstEnergy<sup>1</sup> asks the Public Utilities Commission of Ohio (“Commission”) to strike portions of the Northeast Ohio Public Energy Council’s (“NOPEC”) initial brief related to the legislative history of SB 221. FirstEnergy asks the Commission to strike the authority<sup>2</sup> NOPEC offered on brief, which shows that Ohio’s legislature intended that only quantitative costs (and not qualitative factors) be considered in approving an electric security plan (“ESP”) over a market rate offer (“MRO”) under R.C. 4928.143(C)(1). Specifically, FirstEnergy claims that the legislative drafts and bill analyses NOPEC cited on brief cannot be considered to determine legislative intent because (1) NOPEC has not argued, and the Commission has not found, that R.C. 4928.143(C)(1) is ambiguous, and (2) the authority cited is not a part of the record.

FirstEnergy’s arguments are without merit and its motion must be denied.

---

<sup>1</sup> Applicants The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company collectively will be referred to as “FirstEnergy.”

<sup>2</sup> See FirstEnergy Motion to Strike at 1-2.

## II. ARGUMENT

### A. The Draft Legislation and Bill Analyses of SB 221 Constitute its Legislative History, Which the Commission is Permitted to Consider Pursuant to R.C. 1.49.

R.C. 1.49 provides in part:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

\*\*\*

(C) The legislative history.

It is beyond question that the draft legislation and bill analyses conducted thereon by the Legislative Service Commission (“LSC”) constitute the legislative history of a statute. *Griffith v. Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905 (“*Griffith*”). Thus, FirstEnergy’s argument is reduced to a claim that NOPEC has not argued, and the Commission has not found, that R.C. 4928.143 is “ambiguous.”

NOPEC’s position on brief is clear: although the Ohio Supreme Court has held that only the cost factors contained R.C. 4928.143(B) may be included in an ESP, the Commission has found that it also can consider the “qualitative” benefits of an ESP under R.C. 4928.143(C)(1).<sup>3</sup> With such divergence views between the Court and the Commission, R.C. 4928.143 necessarily is ambiguous. That the Commission or the Court has not so found is immaterial. The Commission can make such a finding in this proceeding, or the Court can do so on appeal.<sup>4</sup>

---

<sup>3</sup> See, *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 402, 2011-Ohio-958 [¶26], 945 N.E.2d 501, in which the Ohio Supreme Court recognized that the items listed in R.C. 4928.143(B) “implicitly require” the Commission to consider “certain costs.” See, also, *In Re Application of Columbus Southern Power Co., et al.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶¶ 31-35], 945 N.E.2d 6551, in which the Court recognized that all nine of the R.C. 4928.143(B)(2) factors provided for “cost recovery” and limited the items to be considered by the Commission in approving an ESP only to those cost provisions specifically enumerated.

<sup>4</sup> Although FirstEnergy cites to several cases in which the Commission has sanctioned consideration of qualitative benefits, NOPEC notes that the issue is on appeal to the Ohio Supreme Court from PUCO Case No. 12-1230-EL-SSO, in Supreme Court Case No. 13-513. Oral argument was held on January 6, 2016.

Absent a lack of authority to support its position, FirstEnergy relies on *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3920 (“*South*”), in which the Court, in dicta, criticized dissenting justices’ reliance on opposition testimony before House and Senate committees to support their position. *South* is distinguishable and not controlling. First, *South* involved consideration of opposition testimony, and not draft legislation and LSC bill analyses as offered in this proceeding. Second, at issue in *South* were severable irreconcilable statutes that the Court harmonized pursuant to its authority under R.C. 1.52. The Court’s authority under R.C. 1.49 was not at issue. The *South* majority’s dicta criticizing the consideration of committee testimony is not controlling inasmuch as the majority in *Griffith* specifically relied on the LSC’s analyses of various pieces of draft legislation in determining legislative intent under R.C. 1.49.

**B. Ohio Supreme Court Precedent Permits the Commission to Consider the Draft Legislation and LSC Bill Analyses as Authority to Support Its Interpretation of Legislative Intent.**

FirstEnergy’s claim that the Commission cannot consider the draft legislation and LSC bill analyses because they were not introduced at hearing also is without merit. FirstEnergy relies on the unreported decision of *State v. Conyers*, 6<sup>th</sup> Dist. Lucas No. L-97-1327, 1998 Ohio App. LEXIS 3274 (July 17, 1998)<sup>5</sup> to support its position that LSC analyses must be introduced at hearing and made a part of the record. However, the Ohio Supreme Court’s subsequent decision in *Griffith* is controlling. *Griffith* came before the Ohio Supreme Court as an appeal from a procedural order of the Ohio Court of Claims, which dismissed a claim for lack of jurisdiction. No evidentiary record was made in the trial court, and yet the Ohio Supreme Court

---

<sup>5</sup> FirstEnergy notes that *Conyers* was affirmed by the Ohio Supreme Court, 87 Ohio St. 3d 246 (1999). However, the Court did not address the lower court’s dicta regarding the reliance to be placed on LSC analyses. Rather, the Court based its affirmance on R.C. 1.51, which provides that “if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.”

relied on draft bills and LSC bill analyses as authority to support its interpretation of legislative intent.

### III. CONCLUSION

For the foregoing reasons, NOPEC respectfully requests that FirstEnergy's motion to strike be denied.

Respectfully submitted,



Glenn S. Krassen (Reg. No. 0007610)  
Counsel of Record  
BRICKER & ECKLER LLP  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
Telephone: (216) 523-5405  
Facsimile: (216) 523-7071  
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)  
Dylan F. Borchers (Reg. No. 0090690)  
BRICKER & ECKLER, LLP  
100 South Third Street  
Columbus, OH 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
dstinson@bricker.com  
dborchers@bricker.com

COUNSEL FOR NORTHEAST OHIO  
PUBLIC ENERGY COUNCIL

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra was served *via electronic mail* upon the parties of record this 14<sup>th</sup> day of March 2016.



Glenn S. Krassen

burkj@firstenergycorp.com  
cdunn@firstenergycorp.com  
dakutik@jonesday.com  
jlang@calfee.com  
talexander@calfee.com  
mkurtz@BKLlawfirm.com  
kboehm@BKLlawfirm.com  
jkylercohn@BKLlawfirm.com  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com  
Jennifer.spinosi@directenergy.com  
ghull@eckertseamans.com  
dparram@taftlaw.com  
Schmidt@sppgrp.com  
ricks@ohanet.org  
tobrien@bricker.com  
mkl@bbrslaw.com  
gas@smxblaw.com  
wttpmlc@aol.com  
lhawrot@spilmanlaw.com  
dwilliamson@spilmanlaw.com  
blanghenry@city.cleveland.oh.us  
hmadorsky@city.cleveland.oh.us  
kryan@city.cleveland.oh.us  
mdortch@kravitzllc.com  
rparsons@kravitzllc.com  
gkrassen@bricker.com  
dstinson@bricker.com  
dborchers@bricker.com  
mitch.dutton@fpl.com  
DFolk@akronohio.gov  
mkimbrough@keglerbrown.com  
sechler@carpenterlipps.com  
gpoulos@enernoc.com  
twilliams@snhslaw.com  
larry.sauer@occ.ohio.gov  
maureen.willis@occ.ohio.gov

sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
cmooney@ohiopartners.org  
callwein@keglerbrown.com  
joliker@igsenergy.com  
mswhite@igsenergy.com  
Bojko@carpenterlipps.com  
barthroyer@aol.com  
athompson@taftlaw.com  
Christopher.miller@icemiller.com  
Gregory.dunn@icemiller.com  
Jeremy.grayem@icemiller.com  
blanghenry@city.cleveland.oh.us  
hmadorsky@city.cleveland.oh.us  
kryan@city.cleveland.oh.us  
tdougherty@theOEC.org  
jfinnigan@edf.org  
Marilyn@wflawfirm.com  
todonnell@dickinsonwright.com  
matt@matthewcoxlaw.com  
mfleisher@elpc.org  
rkelter@elpc.org  
drinebolt@ohiopartners.org  
meissnerjoseph@yahoo.com  
LeslieKovacik@toledo.oh.gov  
trhayslaw@gmail.com  
Jeffrey.mayes@monitoringanalytics.com  
mhpetricoff@vorys.com  
mjsettineri@vorys.com  
glpetrucci@vorys.com  
msoules@earthjustice.org  
sfisk@earthjustice.org  
Thomas.mcnamee@puc.state.oh.us  
Thomas.lindgren@puc.state.oh.us  
Steven.beeler@puc.state.oh.us  
dwolff@crowell.com  
rlehfeldt@crowell.com

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/14/2016 3:46:46 PM**

**in**

**Case No(s). 14-1297-EL-SSO**

Summary: Text Northeast Ohio Public Energy Council's Memorandum Contra First Energy's Motion To Strike electronically filed by Teresa Orahood on behalf of Glenn S. Krassen