

**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)**

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S REPLY BRIEF IN SUPPORT
OF MOTION TO STRIKE PORTIONS OF THE INITIAL BRIEF OF OFFICE OF THE
OHIO CONSUMERS’ COUNSEL AND NORTHWEST OHIO AGGREGATION
COALITION**

On February 26, 2016, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully moved to strike portions of the Initial Brief of Office of the Ohio Consumers’ Counsel and Northwest Ohio Aggregation Coalition (“OCC/NOAC”). Specifically, the Companies moved to strike the following portions of OCC/NOAC’s Initial Brief: (1) Dr. Choueiki’s prior testimony that had been excluded from the record; (2) Dr. Hill’s proffered testimony regarding the Consumer Protection Association; (3) hearsay statements allegedly made by Dynegy; and (4) purported testimony of Leila Vespoli before the House Public Utilities Committee. OCC/NOAC object in their Memorandum Contra to the Commission striking three of these four portions of their Initial Brief.¹ However, OCC/NOAC have failed to show why the Companies’ Motion to Dismiss should not be granted.

¹ OCC/NOAC filed a motion on March 1, 2016, to withdraw the hearsay statements by Dynegy on pages 145-46 of its Initial Brief.

A. Dr. Choueiki's Testimony from a Previous Proceeding Should be Stricken.

OCC/NOAC claim that their use of Dr. Choueiki's prior testimony on page 1 of their Initial Brief is part of their proffer and argument under O.A.C. 4901-1-15(F) that the Attorney Examiner's decision to exclude this testimony from the record was improper.² Rule 15(F) permits a party to address the propriety of a ruling "by discussing the matter as a distinct issue in its initial brief." OCC/NOAC's discussion of the Attorney Examiner's ruling as a distinct issue appears on pages 171-73 of their Initial Brief, and the Companies did not move to strike that discussion. The Companies did move to strike the non-record statement of Dr. Choueiki on page 1 of the Initial Brief precisely because this use of non-record evidence falls outside the "distinct issue" requirement in Rule 15(F). OCC/NOAC's use of this non-record evidence is not "part of the proffer" but is, instead, offered for its allegedly persuasive weight on the very first page of OCC/NOAC's Initial Brief. This use of Dr. Choueiki's prior testimony is improper and should be stricken.

OCC/NOAC attempt to rescue their use of this testimony by arguing that Dr. Choueiki offered similar testimony in this proceeding.³ Yet OCC/NOAC did not quote from Dr. Choueiki's testimony in this proceeding; they quoted Dr. Choueiki's testimony from previous proceedings that the Attorney Examiner specifically found had "no probative weight" and was "unduly prejudicial, confusing, and misleading." Hearing Tr. Vol. XXX at 6327. Thus, regardless of what other testimony Dr. Choueiki submitted in this proceeding, the non-record evidence quoted by OCC/NOAC must be stricken.

² OCC/NOAC Memo. Contra, pp. 3-4.

³ OCC/NOAC Memo. Contra, pp. 4-5.

B. Statements Regarding the Consumer Protection Association Should Be Stricken.

OCC/NOAC argue that their use of Dr. Hill's non-record testimony also is permissible under Rule 15(F).⁴ However, OCC/NOAC's discussion of the "distinct issue" arising from Dr. Hill's re-direct testimony begins on page 46 of the Initial Brief. The Companies moved to strike OCC/NOAC's use of Dr. Hill's testimony on pages 44-45 of the Initial Brief, where OCC/NOAC attempt to use this testimony for purposes other than addressing the propriety of a ruling. This specific use of Dr. Hill's testimony should be stricken.

Moreover, the Companies moved to strike non-record, hearsay evidence on pages 48-49 of the Initial Brief that attempts to bolster Dr. Hill's non-record evidence. The statements and supporting documents discussed at footnotes 158-60 of the Initial Brief are not part of the record, and they were not part of the proffer OCC/NOAC made in support of Dr. Hill's re-direct testimony. These statements do appear in the section of the Initial Brief that is OCC/NOAC's "distinct issue" discussion. However, non-record, non-proffered testimony cannot be used to contest the propriety of an Attorney Examiner's ruling. This portion of the Initial Brief also should be stricken.

C. Unauthenticated Evidence Cannot Be Relied Upon.

OCC/NOAC argue that their reliance upon Exhibit 1 to the Supplemental Testimony of Matthew White (hereinafter "MW Exhibit 1") is proper because this exhibit was admitted into evidence.⁵ However, they also recognize that the Attorney Examiner's decision to admit this exhibit into evidence is the subject of a pending interlocutory appeal.⁶ Although OCC/NOAC

⁴ OCC/NOAC Memo. Contra, p. 5.

⁵ OCC/NOAC Memo. Contra, pp. 6-8.

⁶ OCC/NOAC Memo. Contra, p. 7.

suggest the Companies “filed the wrong pleading” because they did not raise this evidentiary issue in their Initial Brief, O.A.C. 4901-1-15(F) provides that including such an argument in an initial brief is an option only if the argument is not made through an interlocutory appeal. If the Commission grants the Companies’ interlocutory appeal, the Commission also should strike these portions of OCC/NOAC’s Initial Brief.

For the reasons herein and in the Companies’ Motion to Strike, the Commission should grant the Companies’ Motion to Strike Portions of OCC/NOAC’s Initial Brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that this Reply in Support of Motion to Strike was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 18th day of March, 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/ James F. Lang
One of Attorneys for the Companies

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Summary: Reply In Support of Motion to Strike Portions of OCC/NOAC Initial Brief electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company