

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

**JOINT MEMORANDUM CONTRA FIRSTENERGY’S MOTION TO STRIKE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND
NORTHWEST OHIO AGGREGATION COALITION**

The Office of the Ohio Consumers’ Counsel (“OCC”)¹ and the Northwest Ohio Aggregation Coalition (“NOAC”) file this memorandum contra the motion of FirstEnergy² to strike portions of their Joint Reply Brief. FirstEnergy’s claims and allegations in its motion are without merit. Accordingly, the Attorney Examiner’s should deny FirstEnergy’s motion to strike.

I. INTRODUCTION

On February 16, 2016, OCC/NOAC filed its Initial Brief in this proceeding opposing FirstEnergy’s Electric Security Plan, as modified by numerous stipulations. On February 26, 2016, OCC/NOAC filed its Joint Reply Brief. On March 4, 2016, FirstEnergy filed a motion to strike portions of the OCC/NOAC Reply Brief.

¹ OCC represents the 1.4 million residential customers of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

² FirstEnergy consists of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

FirstEnergy mistakenly believes that certain portions of the OCC/NOAC Reply Brief should be stricken because it includes testimony that the Attorney Examiner excluded from the record and amounts to hearsay that is not in the record.³ FirstEnergy is wrong.

OCC/NOAC's Reply Brief does not contain improper information or evidence and FirstEnergy has failed to prove otherwise. The information that FirstEnergy seeks to strike from the OCC/NOAC Initial Brief was properly included as either record evidence or as a challenge to an attorney examiner ruling under O.A.C. 4901-1-15(F). For the reasons explained more fully below, the Public Utilities Commission of Ohio ("PUCO") should deny FirstEnergy's motion to strike.

II. RECOMMENDATIONS

A. Excluded testimony or evidence not in the record may be relied upon in a post-hearing brief in order to challenge an attorney examiner's ruling under O.A.C. 4901-1-15(F).

FirstEnergy claims that OCC/NOAC improperly reference excluded or non-record evidence in their Reply Brief. Specifically, FirstEnergy claims that references to PUCO Staff witness Dr. Choueiki's testimony from a previous proceeding was improper. FirstEnergy also moves to strike OCC/NOAC references to Ohio Manufacturers' Association Energy Group ("OMAEG") witness Edward Hill's testimony on the Consumer Protection Association. FirstEnergy believes the references were improper because the Attorney Examiner excluded this evidence from the record.⁴ FirstEnergy is incorrect.

³ FirstEnergy Motion to Strike Portions of OCC/NOAC Reply Brief at 1 (March 4, 2016).

⁴ See FirstEnergy Motion to Strike Portions of OCC/NOAC Reply Brief at 1, 3-5.

Under O.A.C. 4901-1-15(F) a party may raise the propriety of an attorney examiner's written or oral ruling as an issue for the PUCO to consider by discussing the matter in the party's initial brief.⁵ Indeed, the PUCO has denied a motion to strike proffered evidence contained in a post-hearing brief when the evidence was offered to challenge an attorney examiner's ruling.⁶

First, OCC/NOAC's reference to the previous testimony of Dr. Choueiki in its Reply Brief was not improper. FirstEnergy specifically seeks to strike the following portion of the OCC/NOAC Reply Brief:

“Indeed Dr. Choueiki testified that granting a PPA rider is a move in the opposite direction.”⁷

As FirstEnergy notes, this testimony originates from Dr. Choueiki's testimony from a previous proceeding.⁸ It concerns Dr. Choueiki's opinion on how the Retail Rate Stability

⁵ See O.A.C. 4901-1-15(F).

⁶ See *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010; In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 10-268-EL-FAC, et al., Opinion and Order at 7-8 (May 14, 2014) (PUCO denying a motion to strike evidence from an initial brief that was excluded from the record but proffered by the party and then included in the initial brief in order to challenge the attorney examiner's ruling).

⁷ See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 1 (FirstEnergy also moves to strike the accompanying footnote). See also OCC/NOAC Reply Brief at 1.

⁸ See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 3-4. See also Proffer Tr. XXX at 6218-6222; Proffered OCC Ex. 31 (*In the Matter of the Application of 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. 13-2385, Choueiki Direct Testimony (May 20, 2014)); Proffered OCC Ex. 30 (*In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Choueiki Direct Testimony (October 2, 2014)).

Rider in this proceeding squares with Ohio's competitive generation market.⁹ The Attorney Examiner denied OCC's requests to introduce (as exhibits) Dr. Choueiki's testimony from two prior proceedings.¹⁰ The OCC then requested that the evidence be proffered.¹¹ That proffer was accepted.

Instead of filing an interlocutory appeal the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested in their Initial Brief that the PUCO reverse the Attorney Examiner's decision.¹² The portions of the OCC/NOAC Reply Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC's challenge to the attorney examiner ruling. The passage from OCC/NOAC's brief should be considered as part of the proffer, as it specifically shows how OCC/NOAC intended to use the stricken evidence. FirstEnergy neglects to discuss or rebut this fact.. Therefore, this portion of the OCC/NOAC Reply Brief is not improper.

But there are more reasons to deny FirstEnergy's motion. As the Retail Energy Supply Association ("RESA") noted,¹³ the evidentiary record in this proceeding includes

⁹ See Tr. Vol. XXX at 6218 -6222 (October 16, 2015); See also Proffered OCC Ex. 31 (*In the Matter of the Application of 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. 13-2385, Choueiki Direct Testimony at 9 (May 20, 2014)); Proffered OCC Ex. 30 (*In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Choueiki Direct Testimony at 17 (October 2, 2014)).

¹⁰ See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 3-4.

¹¹ See Tr. Vol. XXX at 6218 -6222 (October 16, 2015) (OCC proffered OCC Ex. 30 the testimony of Dr. Hisham Choueiki in Case No. 14-841-EL-SSO and OCC Ex. 31 the testimony of Dr. Hisham Choueiki in Case No. 13-2385-EL-SSO).

¹² See OCC/NOAC Initial Brief at 171-173 (OCC/NOAC requesting that the PUCO reverse rulings where the Attorney Examiner erred in denying the admission of OCC Exhibits 30 and 31, the previous testimony of Dr. Choueiki, into the record).

¹³ See RESA's Memorandum Contra the Motion to Strike by FirstEnergy, Case No. 14-1297-EL-SSO, at 2 (March 7, 2016).

testimony from Dr. Choueiki on this very point.¹⁴ Indeed, the record contains the following question and answer between counsel for OCC and PUCO Staff witness Dr. Choueiki:

- Q. I'm not sure, Dr. Choueiki, you answered my question. My question simply was would you believe that if the PUCO were to allow the rider RRS under the staff's alternative recommendation, that that would represent in your mind a move away from fully -- a fully competitive generation market?
- A. Yes, if we are having a theoretical discussion, I would agree with that statement.¹⁵

Therefore, the evidence that FirstEnergy is seeking to strike from the OCC/NOAC Initial Brief is already properly before the PUCO. FirstEnergy's motion to strike should be denied.

Second, FirstEnergy moves to strike OCC/NOAC's reference in its Initial Brief to the testimony of OMAEG witness Mr. Hill concerning the Consumer Protection Association.¹⁶ FirstEnergy's motion is, again, without merit.

As FirstEnergy notes, the Attorney Examiner struck Mr. Hill's testimony on this subject from the record because it was deemed beyond the scope of cross examination.¹⁷ Instead of filing an interlocutory appeal, the OCC/NOAC, in accordance with O.A.C. 4901-1-15(F) and PUCO precedent, explicitly requested that the PUCO reverse the Attorney Examiner's decision.¹⁸ The OCC/NOAC made a similar request in their Reply

¹⁴ See Tr. XXX at 6225:19-6226:4 (Choueiki public).

¹⁵ Tr. Tr. XXX at 6225:19-6226:4 (Choueiki public).

¹⁶ See FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 1, 4-5 (the relevant portions are numbered 2).

¹⁷ FirstEnergy Motion to Strike OCC/NOAC Reply Brief at 4-5 citing Tr. Vol. XXXIX at 8388-8393.

¹⁸ See OCC/NOAC Initial Brief at 46-49.

Brief.¹⁹ But the portions of the OCC/NOAC Reply Brief that FirstEnergy moves to strike all stem from and lend support to OCC/NOAC's challenge to the Attorney Examiner ruling. FirstEnergy neglects to discuss or rebut this fact in its motion to strike.

OCC/NOAC's reference to Dr. Choueiki's and Mr. Hill's testimony is not improper. FirstEnergy's Motion to Strike these portions from f OCC/NOAC's Reply Brief should be denied.

III. CONCLUSION

Through its Motion to Strike, FirstEnergy would have the PUCO deny OCC the right to challenge an Attorney Examiner's ruling. Additionally, FirstEnergy would have the Commission take away OCC's right to cite to record evidence. This is neither reasonable, lawful, or supported by Commission practice or policy. FirstEnergy's OCC Motion to Strike should be denied.

¹⁹ See OCC/NOAC Reply Brief at 82 ("Furthermore, the PUCO should reverse the Attorney Examiner's ruling that excluded Professor Hill's testimony on the Consumer Protection Association.").

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer

Larry S. Sauer (0039223)
Counsel of Record
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov
(All Attorneys Will Accept Service Via
E-mail)

/s/ Thomas R. Hays

Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com
(Will Accept Service Via E-mail)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Joint Memorandum Contra FirstEnergy's Motion to Strike was served upon the persons listed below via electronic transmission this 21st day of March, 2016.

/s/ Larry S. Sauer

Larry S. Sauer

Deputy Consumers' Counsel

SERVICE LIST

Thomas.mcnamee@puc.state.oh.us

Thomas.lindgren@puc.state.oh.us

Steven.beeler@puc.state.oh.us

mkurtz@BKLawfirm.com

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.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@smxblaw.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

burkj@firstenergycorp.com

cdunn@firstenergycorp.com

jlang@calfee.com

talexander@calfee.com

dakutik@jonesday.com

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

cmooney@ohiopartners.org

callwein@keglerbrown.com

joliker@igsenergy.com

mwhite@igsenergy.com

Bojko@carpenterlipps.com

ghiloni@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

dborchers@bricker.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
dwolff@crowell.com
rlehfeldt@crowell.com
rkelter@elpc.org
evelyn.robinson@pjm.com
sfisk@earthjustice.org

mfleisher@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

Attorney Examiners:

Gregory.price@puc.state.oh.us
Mandy.willey@puc.state.oh.us
Megan.addison@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/21/2016 2:58:12 PM

in

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

Summary: Memorandum Joint Memorandum Contra FirstEnergy's Motion to Strike by the Office of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.