

**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 IN SUPPORT OF
MOTION TO STRIKE, IN WHOLE OR IN PART, THE REPLY BRIEF OF NOBLE
AMERICAS ENERGY SOLUTIONS LLC**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully moved on March 4, 2016, to strike the Reply Brief of Noble Americas Energy Solutions LLC (“Noble”) in its entirety because Noble is not a party to this proceeding or, in the alternative, to strike portions of Noble’s brief that rely on a private report and a news article that are not in the record in this case and that are inadmissible hearsay. In response, Noble argues that it is entitled to file a reply brief because its late-filed motion to intervene remains pending. Noble further argues that the hearsay statements it included in its brief should not be stricken because they support Noble’s position. Noble’s arguments lack merit.

Noble is not a party entitled to file a reply brief in this proceeding. Noble points out that the Commission’s rules specify that a person that has filed a motion to intervene should be considered a party for specific purposes – service, motions and discovery.¹ However, none of those limited exceptions authorizes a non-party to file a reply brief. Instead, O.A.C. 4901-1-10

¹ Noble Memo. Contra, p. 3.

directs that a person is not a party unless granted leave to intervene, and Noble has not been granted leave to intervene.

The prejudice to the Companies by Noble's actions is highlighted by Noble's choice not to file an initial brief. Noble chose instead to wait to file objections to the Companies' proposed ESP IV in a reply brief, although any and all of its objections could have been set out in an initial brief. Noble must have wanted to deprive the Companies of an opportunity to rebut Noble's erroneous positions. Noble has played fast and loose with the Commission's rules, first by attempting a late-filed intervention without good cause and second by ignoring the Commission's briefing rules. Because Noble is not a party and its tactics have prejudiced the Companies, its reply brief should be stricken in its entirety.

Noble opposes the Companies' motion to strike from footnote 5 of its reply brief the policy piece prepared by the Institute for Energy Economics and Financial Analysis ("EEFA") on the ground that this document supports its comments.² Noble also describes the EEFA policy document as "a public comment filed in the record on February 16, 2016."³ While the EEFA document was docketed as an attachment to a letter on February 16, 2016, it is not part of the case record and is not evidence upon which the Commission may rely in issuing its decision in this proceeding. The evidentiary record was closed with the last day of evidentiary hearings on January 22, 2016. "Documents 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." *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, Opinion and Order at 3 (Nov. 21, 2006).

² Noble Memo. Contra, p. 4.

³ *Id.*

The Commission would be creating a dangerous precedent if it were to find that hearsay documents docketed after a hearing is complete are part of the record that parties can rely on in post-hearing briefs. Under long-established Commission practice, Noble's reference to the EEFA document should be stricken from its reply brief.

With respect to the hearsay, non-record statement in footnote 21 of Noble's reply brief, Noble offers no defense for it being stricken.⁴ Indeed, Noble offers to withdraw that portion of its reply brief.⁵ The Commission should accept Noble's offer.

The Commission should strike Noble's reply brief in its entirety. In the alternative, the Commission should strike the reference to the EEFA document in footnote 5 of Noble's reply brief and accept Noble's withdrawal of the discussion and citation to the RTO Insider article in footnote 21 of NOPEC's reply brief.

Respectfully Submitted,

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⁴ Noble Memo. Contra, p. 4.

⁵ *Id.*

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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 25th 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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in

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

Summary: Reply in Support of Motion to Strike Noble Americas Energy Solutions Reply 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