

**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 for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

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

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portions of the Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Application for Rehearing on behalf of the Ohio Manufacturers’ Association Energy Group (“OMAEG”), to wit: the entirety of Section II.H, beginning on page 24 with the bolded words “The Commission” and continuing through the end of the second to last full paragraph on page 26 with the words “its ESP” and footnotes 108 through and including 115.

The Commission should strike this material from OMAEG’s brief because it constitutes an untimely application for rehearing and its inclusion in OMAEG’s brief is prejudicial to the Companies. 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 memorandum contra noted above.

Date: December 2, 2016

Respectfully submitted,

/s/ David A. Kutik

Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

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

I. INTRODUCTION

On November 25, 2016, OMAEG filed its memorandum contra the Companies' Application for Rehearing of the Fifth Entry on Rehearing.¹ But despite its purported purpose—responding to issues raised in the Companies' Application for Rehearing—one section of the OMAEG Memorandum Contra is not devoted to rebutting any argument made by the Companies or any other party in an Application for Rehearing. Specifically, Section II.H of OMAEG's brief argues that "[t]he Commission erred in extending the Companies [sic] right to withdraw its [sic] ESP" and explains that OMAEG "supports" the arguments raised on this point in the Application for Rehearing of the Office of the Ohio Consumers' Counsel ("OCC").² OMAEG goes on to urge the Commission "to reverse, on rehearing, its decision to provide the Companies with an

¹ Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Application for Rehearing on behalf of the Ohio Manufacturers' Association Energy Group (Nov. 25, 2016) (the "OMAEG Memorandum Contra").

² OMAEG Memorandum Contra, p. 24 (citing Ohio Consumers' Counsel Application for Rehearing at 41-43 (November 14, 2016)).

unfettered right to withdraw its [sic] ESP.”³ OMAEG’s argument, which raises an assignment of error that OMAEG never asserted in its Application for Rehearing,⁴ is improper under both the Ohio Administrative Code and Commission precedent. Further, the argument’s inclusion in a memorandum contra is prejudicial to the Companies because they have no opportunity to respond. For these reasons, Section II.H of the OMAEG Memorandum Contra must be stricken in its entirety.

II. OMAEG’S NEW ASSIGNMENT OF ERROR IS UNTIMELY, IMPROPER, AND PREJUDICIAL.

Rule 4901-1-35, O.A.C., sets forth the procedures for filing applications for rehearing and memorandum contra in Commission proceedings. Subsection (B) of the Rule provides, “Any party may file a memorandum contra within ten days after the filing of an application for rehearing.” Neither subsection (B) nor any other provision of the Rule permits parties to file memoranda in support of other parties’ applications.

The Commission has expressly recognized the narrow scope of Rule 4901-1-35 and granted motions to strike portions of memoranda contra that exceed the Rule’s bounds.⁵ Indeed, the Commission has held:

Rule 4901-1-35, O.A.C., is limited in scope to the filing of memorandum contra applications for rehearing. To the extent that a party believes that it is necessary to inform the Commission of its support for another party's rehearing position, the appropriate

³ *Id.* at 26.

⁴ See generally Application for Rehearing of the Ohio Manufacturers’ Association Energy Group (Nov. 14, 2016).

⁵ See *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007), p. 3 (granting motion to strike portions of memoranda contra raising arguments in support of other party’s application for rehearing); *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of Ohio Power Company and Related Matters*, Case No. 98-101-EL-EFC, et al., Entry on Rehearing (July 15, 1999), p. 8 (granting motion to strike portion memorandum contra raising arguments that did not respond to the companies’ application for rehearing).

motion for leave to file a memorandum in support should be submitted for the Commission's consideration. Inasmuch as the identified portions of [the parties'] memoranda contra are in actuality memoranda in support, [those] sections shall be stricken.⁶

The Commission has also granted a motion to strike statements made in a memorandum contra that the movant argued “constituted improper additional argument to support the Intervenors' own application for rehearing and not a reply to the Companies' application for rehearing.”⁷ Granting the motion to strike, the Commission found that those arguments were “irrelevant to Intervenors’ stated purposes of countering the Companies’ application for rehearing and serve only to bolster Intervenors’ position relative to their own application or rehearing.”⁸

The Commission should similarly grant the Companies’ Motion here. The arguments raised in Section II.H of the OMAEG Memorandum Contra do not attempt to refute any argument raised in the Companies’ or any other party’s Application for Rehearing. Instead, OMAEG raises a new assignment of error in the form of “support” for a position taken in another intervenor’s brief. This is patently improper in a memorandum contra, as Rule 4901-1-35 and Commission precedent make clear.⁹ Allowing OMAEG to make arguments in its memorandum contra that OMAEG could have and should have made in its Application for

⁶ Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct. 17, 2007), p. 3.

⁷ Case No. 98-101-EL-EFC, et al., Entry on Rehearing (July 15, 1999), p. 8.

⁸ *Id.*

⁹ To be sure, in their Memorandum Contra, the Companies argued in partial support of a position taken by OEC/EDF/ELPC in their Application for Rehearing, but only so far as necessary to support an argument in the Companies' own application. Companies’ Memorandum Contra, pp. 85-86. Specifically, the Companies agreed with OEC/EDF/ELPC that the Commission should require the Companies to comply with their obligation to "strive to achieve 800,000 MWh of annual energy savings" under the Third Supplemental Stipulation, *provided that* the Commission also grants rehearing, per the Companies' Application for Rehearing, to authorize the increase in the shared savings cap to \$25 million annually. *Id.* Unlike OMAEG's arguments here, the Companies' position is tied to arguments raised in their Application for Rehearing, wherein the Companies asserted, "If the Commission grants rehearing to authorize the increase in the shared savings cap . . . , the Commission also should affirm its March 31 Order approving the 800,000 MWh goal." Companies’ Application for Rehearing, p. 29.

Rehearing is prejudicial to the Companies because they have no opportunity to respond. Section II.H of the OMAEG Memorandum Contra should be stricken in its entirety.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' Motion to Strike.

Date: December 2, 2016

Respectfully submitted,

/s/ David A. Kutik
Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

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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 2nd day of December, 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 email.

/s/ David A. Kutik
David A. Kutik

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

Summary: Motion to Strike Portions of OMAEG's Memorandum Contra electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company