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 Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019	)))))))	Case No. 16-0743-EL-POR

MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE A PORTION OF THE OHIO HOSPITAL ASSOCIATION'S POST-HEARING BRIEFING

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") respectfully move to strike the following portions of the Ohio Hospital Association's ("OHA") Post-Hearing Briefing:

1. **OHA's Initial Post-Hearing Brief:** Page 6, first full paragraph, beginning with "Hospitals" through the end of the paragraph, including accompanying footnotes 13 and 14; and

2. **OHA's Reply Brief:** Page 4, second line from the top, beginning with "In addition" through "in support of OHA," including accompanying footnote 17.

The Commission should strike this material from OHA's briefing because it relies upon information that is not in the evidentiary record. Further, the letters OHA cites are inadmissible hearsay. For these reasons, fully set forth in the attached memorandum in support, the Commission should grant this Motion and strike the requested portions of OHA's Post-Hearing Briefing.

March 10, 2017

Respectfully submitted,

/s/ *Carrie M. Dunn*

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ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE PORTIONS OF THE OHIO HOSPITAL ASSOCIATION'S POST-HEARING BRIEFING

I. INTRODUCTION

On page 6 of its Initial Post-Hearing Brief, the Ohio Hospital Association ("OHA") asserts that "[h]ospitals within FirstEnergy's territory support OHA's participation as program administrator."[1] In its Reply Brief, OHA similarly contends that "hospitals in FirstEnergy's territory have indicated that OHA's participation as program administrator is critical."[2] In support of these assertions, OHA cites to three letters filed as "Public Comments" with the Commission: (1) a letter purportedly from MetroHealth, filed on February 21, 2017 (the due date for initial post-hearing briefs in this proceeding); (2) a letter purportedly from Ohio Society for Healthcare Facilities Management, also filed on February 21, 2017; and (3) a letter purportedly from Lake Health, filed on March 3, 2017 (the due date for post-hearing reply briefs in this proceeding).[3]

[1] The Ohio Hospital Association's Initial Post-Hearing Brief ("OHA Initial Brief") at 6.
[2] The Ohio Hospital Association's Reply Brief ("OHA Reply Brief") at 4.
[3] OHA Initial Brief at 6, fn. 13 & 14; OHA Reply Brief at 4, fn. 17.

OHA's attempted use of these letters is improper for two reasons.

First, these letters were not presented at the hearing in this proceeding and are not part of the evidentiary record.[4] In fact, at the hearing, OHA presented ***no direct evidence*** related to hospital support of OHA's participation as a program administrator.[5] OHA cannot now rely on information not in the evidentiary record in an attempt to bolster its argument. ***Second***, even if the letters had been offered at the hearing, they would have constituted inadmissible hearsay.

Accordingly, the Commission should grant the Companies' Motion and strike the relevant portions of OHA's Post-Hearing Briefing.

II. LAW & ARGUMENT

A. OHA May Not Rely On Evidence That Is Not In The Record.

OHA attempts to bolster its argument that "[h]ospitals within FirstEnergy's territory support OHA's participation as program administrator" and deem such participation "critical" by citing to the three letters. This attempt, however, is improper because the three letters are not part of the evidentiary record.

It is well-established that "new information should not be introduced after the closure of the record."[6] As the Commission has previously observed, if evidence were allowed "to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or refute statements contained in the document."[7]

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[4] *See generally*, Hearing Tr.
[5] *Id.*
[6] *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 Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion & Order, p. 37 (Mar. 31 2016) ("ESP IV March 31 Order").
[7] *See In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-0786-TR-CVF, Opinion & Order, p. 2 (Nov. 21, 2006) (granting motion to strike and holding that documents that are not part of the record may not be relied upon in post-hearing briefing).

In January, the Commission held a five-day hearing that resulted in the introduction of hundreds of pages of pre-filed direct testimony, supplemental testimony, rebuttal testimony, live testimony, and exhibits.[8] At the end of the fifth day of the hearing (January 31, 2017), the Attorney Examiner formally closed the record in this proceeding.[9] It is undisputed that OHA was a party to the proceeding and chose not to introduce any direct evidence on its behalf.[10]

To bolster its argument, OHA now seeks to rely on three letters purported to be from MetroHealth, Ohio Society for Healthcare Facilities Management, and Lake Health, all of which were filed as "Public Comments" with the Commission.[11] Such reliance, however, is improper at this juncture.[12] Indeed, the letters were not offered (let alone admitted) at the hearing, and their authors were not subject to cross-examination. The letters were also never authenticated in this proceeding. In fact, according to the dates on the letters themselves, they were not even drafted until weeks ***after*** the record closed.

Thus, the Commission should strike the portions of OHA's Post-Hearing Briefing that rely on the letters. If OHA wished to present evidence that "[h]ospitals within FirstEnergy's territory support OHA's participation as program administrator," it should have done so during the evidentiary hearing.

B. Even If OHA Had Offered The Letters At Hearing, They Would Have Been Inadmissible.

Even if OHA had offered the letters at hearing, they would not have been admissible absent a witness authenticating them and being subject to cross-examination. Here, OHA offers the letters to establish that "[h]ospitals within FirstEnergy's territory support OHA's participation as program

[8] *See generally*, Hearing Tr.
[9] *Id.* at 636:6-8 ("Anything further? Well then, this record will be closed and submitted for the Commission's decision.").
[10] *See generally*, *id.*
[11] *See* OHA Initial Brief at 6, fn. 13 & 14; OHA Reply Brief at 6, fn. 17.
[12] *See* ESP IV March 31 Order at 37.

administrator" and that said hospitals "have indicated that OHA's participation as program administrator is critical."[13] Such out of court statements (the authors did not testify at the hearing) may not be offered to prove the truth of the matter asserted (that certain hospitals support OHA serving as a program administrator).[14]

And this rule makes sense, as permitting such evidence would preclude opponents from challenging those out of court statements through cross-examination. Here, such cross-examination would likely have revealed that OHA's participation as a program administrator is not as instrumental to their organizations' participation in the rebate program as the letters appear to suggest. For example, if given the opportunity to cross-examine the authors of the letters, the Companies could have inquired into their knowledge regarding the Companies' other vendors who offer similar assistance to hospitals, or the fact that OHA is not precluded from assisting its membership with participation in the Companies' rebate program. Regardless, neither the Companies nor any other parties were given the opportunity to make such inquiries because the letters were never made part of the evidentiary record, and their authors were never made available for cross-examination.

Accordingly, OHA's after-the-fact reliance on the letters is improper, and the Commission should strike those portions of OHA's Post-Hearing Briefing.

[13] OHA Initial Brief at 6; OHA Reply Brief at 4.
[14] *See* OHIO R. EVID. 801(C), 802.

IV. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission grant the Companies' Motion by striking the following portions of OHA's Post-Hearing Briefing:

1. **OHA's Initial Post-Hearing Brief:** Page 6, first full paragraph, beginning with "Hospitals" through the end of the paragraph, including accompanying footnotes 13 and 14; and

2. **OHA's Reply Brief:** Page 4, second line from the top, beginning with "In addition" through "in support of OHA," including accompanying footnote 17.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion To Strike Portions Of The Ohio Hospital Association's Post-Hearing Briefing* will be served on this 10th day of March, 2017 by the Commission's e-filing system to the parties who have electronically subscribed to this case and via electronic mail upon the following counsel of record:

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NAI-1502541884

Summary: Motion --Motion and Memorandum in Support of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Strike a Portion of the Ohio Hospital Association's Post-Hearing Briefing electronically filed by Mr. Joshua R. Eckert on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company