

**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. 16-743-EL-POR
Edison Company for Approval of their)	
Energy Efficiency and Peak Demand)	
Reduction Program Portfolio Plans for)	
2017 through 2019.)	

**MEMORANDUM CONTRA MOTION OF FIRSTENERGY TO STRIKE
PORTIONS OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL POST-
HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In its briefs in this case,¹ OCC demonstrated that FirstEnergy's proposed settlement does not benefit customers or the public interest because it does not adequately limit the amount that customers will pay for FirstEnergy's energy efficiency programs. Among many other things, OCC provided a summary of potential ways that FirstEnergy could modify its portfolio to achieve its statutory benchmark energy savings under the PUCO Staff's and OCC's proposed cost cap. This summary, provided in an exhibit to OCC's initial brief ("OCC Exhibit A"), is based entirely on facts that FirstEnergy itself presented at hearing.

Yet FirstEnergy seeks to strike this exhibit, apparently because it was not presented to FirstEnergy at the hearing in precisely the form found in OCC's brief. FirstEnergy's motion should be denied.

¹ Post-Hearing Brief by the Office of the Ohio Consumers' Counsel (Feb. 21, 2017); Reply Brief by the Office of the Ohio Consumers' Counsel (Mar. 3, 2017).

OCC is entitled to take record evidence and to present it in any manner in its post-hearing briefs: words, clauses, sentences, paragraphs, charts, diagrams, exhibits, etc. The PUCO should not strike a portion of OCC's brief that is based entirely on record evidence simply because it is organized in a way that FirstEnergy is not familiar with.

FirstEnergy also seeks to strike OCC's references to a PUCO order in AEP Ohio's energy efficiency portfolio case. In particular, FirstEnergy claims that because the language from the AEP order is dicta, OCC should be prohibited from referring to that language as "sound regulatory policy." This argument is also meritless. The PUCO should not strike a portion of OCC's briefs that is based on a PUCO order simply because FirstEnergy disagrees with the sound regulatory policy espoused by the PUCO in a similar proceeding. The evidence in this case demonstrates that a cost cap is indeed sound regulatory policy—and the AEP order confirms that the PUCO recognizes the value of the cost cap.

The PUCO should deny FirstEnergy's motion to strike in its entirety.

I. ARGUMENT

A. OCC Exhibit A is based solely on record evidence. There is no basis to strike it.

In its motion to strike, FirstEnergy states: "It is well-established that 'new information should not be introduced after the closure of the record.'"² OCC agrees. Based on this rule, FirstEnergy argues that OCC Exhibit A should be stricken.³ But the problem with FirstEnergy's argument is that the information sought to be struck is not

² Motion to Strike at 3 (quoting In re Application of [FirstEnergy] for Authority to Provide a Standard Serv. Offer, Case No. 14-1297-EL-SSO (Mar. 31, 2016)).

³ Id.

new information. It consists entirely of record evidence and simple calculations that derive from this evidence. It therefore should not be stricken.

On brief, parties are entitled to cite record evidence. They are also entitled to perform basic mathematical calculations using record evidence. PUCO precedent confirms this principle. In a case involving the PUCO Staff, a utility moved to strike portions of the PUCO Staff's initial brief because the brief included "various assumptions, calculations, and tables which the Staff developed from the record."⁴ The utility argued that the record should be reopened so that the PUCO Staff could present its assumptions, calculations, and tables as expert testimony.⁵ The PUCO denied the motion to strike because the PUCO Staff's tables and calculations were based on record evidence.⁶

In a case involving OCC, OCC's initial brief similarly included calculations based on record evidence.⁷ The PUCO Staff moved to strike these calculations.⁸ OCC responded that the mathematical calculations were simple and elemental and did not require expert testimony.⁹ The PUCO agreed with OCC and denied the motion to strike.¹⁰

From a policy perspective, these decisions make sense. Parties should be permitted to rely on evidence in the record and to draw reasonable and logical inferences from that evidence. Interpreting the evidence and presenting it in an organized manner is

⁴ In re Investigation Into Long-Term Solutions Concerning Disconnection of Gas & Elec. Serv. in Winter Emergencies, 1984 Ohio PUC LEXIS 358, at *3, PUCO Case No. 83-303-GE-COI (Aug. 2, 1984).

⁵ Id. at *1.

⁶ Id.

⁷ In re Application of the Chillicothe Tel. Co. for an Increase in its Rates & Charges for Tel. Serv., 1986 Ohio PUC LEXIS 20, PUCO Case No. 85-995-TP-AIR (Nov. 12, 1986).

⁸ Id. at *39.

⁹ Id.

¹⁰ Id.

the very purpose of a post-hearing brief. If parties were limited to merely parroting the evidence verbatim, then there would be no point in filing post-hearing briefs.

OCC Exhibit A includes information regarding FirstEnergy's projected energy (MWh) saved, budgets, and cost per first-year kWh on a program-by-program basis. All of the information in OCC Exhibit A comes directly from (coincidentally) Exhibit A to the Settlement in this case ("Settlement Exhibit A"), which was admitted into the record as Joint Exhibit 1.¹¹ The "MWh" and "Settlement Budget" columns come directly from Settlement Exhibit A.¹² The \$/kWh numbers are the result of simple division: the Settlement Budget column divided by the MWh column. And the "TOTAL" row at the bottom is the result of simple math (addition and division) that aggregates the rows above. The fact that OCC Exhibit A was not itself, in its exact form, admitted into the record, does not change the fact that it is based entirely on record evidence. Consistent with the PUCO's common-sense precedent, the PUCO should deny FirstEnergy's motion to strike OCC Exhibit A.

B. OCC Exhibit A is not expert testimony; it is a summary of record evidence.

FirstEnergy also argues that OCC Exhibit A is expert testimony and therefore should have been presented, in its exact form, during the hearing.¹³ This argument fails.

The Ohio Rules of Evidence define expert witness testimony as testimony that "either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons."¹⁴ Expert witness testimony

¹¹ Trans. I at 170-71 (admitting Joint Exhibit 1 into the record).

¹² See Settlement, Exhibit A (providing MWh and budget projections for each sub-program).

¹³ Motion to Strike at 4-5.

¹⁴ Ohio R. Evid. 702(A).

must be "based on reliable scientific, technical, or other specialized information."¹⁵ An expert witness must have "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony."¹⁶

OCC Exhibit A does not relate to matters beyond the knowledge or experience possessed by lay persons. It does not dispel a misconception among lay persons. And it does not require scientific, technical, or other specialized information. Rather, OCC Exhibit A is a *summary* of evidence that is already in the record. Summarizing record evidence and performing basic math (addition and division) do not require specialized knowledge, skill, experience, training, or education.¹⁷ OCC Exhibit A, therefore, is not expert witness testimony. The PUCO should deny FirstEnergy's motion to strike.

C. Dicta is persuasive authority.

OCC is entitled to rely on statements made in PUCO orders as persuasive authority, even if those statements are dicta. Black's Law Dictionary defines dictum as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (*although it may be considered persuasive*)."¹⁸ Both the Ohio Supreme Court and United States Supreme Court agree that

¹⁵ Ohio R. Evid. 702(C).

¹⁶ Ohio R. Evid. 702(B).

¹⁷ See *United States v. Madison*, 226 Fed. Appx. 535, 543-44 (6th Cir. 2007) ("A mathematical calculation well within the ability of anyone with a grade-school education is, in our opinion, more aptly characterized as a lay opinion . . .") (quoting *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114 (10th Cir. 2005)).

¹⁸ Black's Law Dictionary (8th Ed.) (definition of "obiter dictum," which is often referred to simply as "dictum") (emphasis added).

dicta can be persuasive.¹⁹ There is no rule or law that prohibits parties from citing dicta as persuasive authority.

In an order approving AEP Ohio's energy efficiency portfolio, the PUCO stated:

The addition of an annual cost cap is a reasonable response to concerns which have been raised regarding potential increases in the costs of the EE/PDR programs, and the annual cost cap should incent AEP Ohio to manage the costs of the programs in the most efficient manner possible. In light of the importance of the annual cost cap, the Commission notes that we will be reluctant to approve stipulations in other EE/PDR program portfolio cases which do not include a similar cap on EE/PDR program costs.²⁰

OCC believes that an annual limit on the amount that Ohio utilities can charge their customers for energy efficiency program costs and profits is sound regulatory policy. So in its initial and reply brief, OCC cited the AEP order and referred to the PUCO's comments supporting a cost cap as "sound regulatory policy."²¹

In its motion to strike, however, FirstEnergy argues that because the AEP order is not binding on FirstEnergy, OCC should not be permitted to discuss the PUCO's AEP order and should not be permitted to refer to a cost cap as "sound regulatory policy."²² This argument is meritless.

OCC never asserted that the AEP order is binding on FirstEnergy. But the PUCO signaled its belief that an annual cost cap is sound regulatory policy by referring to it as a "reasonable response" to increasing costs, referring to the "importance of the annual cost

¹⁹ *Rauhaus v. Buckeye Local School Dist. Bd. of Educ.*, 6 Ohio 3d 320, 323 (1983) ("although the dicta of the opinion is not controlling, it is persuasive . . ."); *Cent. Green Co. v. U.S.*, 531 U.S. 425, 431 (2001) ("dicta 'may be followed if sufficiently persuasive . . .'" (quoting *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935))).

²⁰ Opinion & Order ¶ 32, Case No. 16-574-EL-POR (Jan. 18, 2017).

²¹ See OCC Initial Brief at 1 (citing the AEP order); OCC Reply Brief at 2 (citing the AEP order and referring to the cost cap as "sound regulatory policy").

²² Motion to Strike at 5-6.

cap," and stating that it would be "reluctant" to improve settlements that do not include a cost cap. The fact that FirstEnergy disagrees with the concept of a cost cap does not prohibit OCC from citing the AEP order or from relying on the AEP order as persuasive authority that a cost cap is a sound regulatory policy. The PUCO should deny FirstEnergy's attempt to strike OCC's references to the AEP order.

D. OCC's citation to the AEP order is not "disingenuous," as FirstEnergy claims.

FirstEnergy claims that "OCC's attempt to now rely on that dicta by characterizing it as a 'sound [and binding] regulatory policy' is disingenuous."²³ But the words "and binding" are not found in OCC's brief. That's because FirstEnergy added them to this quote.

OCC did not argue that the AEP order is binding on the PUCO in FirstEnergy's case. OCC simply quoted the language and stated OCC's belief that this is a sound regulatory policy—because it is. The PUCO should deny FirstEnergy's request to strike the portions of OCC's briefs that cite to the order approving AEP's energy efficiency portfolio.

II. CONCLUSION

OCC, like any other party to a proceeding, has the discretion to present evidence as it sees fit when formulating its briefs. There is no rule or law prohibiting parties from organizing record evidence in a chart and including that chart in a brief, even if the evidence was not presented in that particular form as part of the evidentiary hearing. FirstEnergy's motion to strike does not pertain to new evidence. It seeks to limit and

²³ Motion to Strike at 5-6.

dictate the way OCC presents record evidence in its brief. The PUCO should deny the motion to strike and should consider OCC Exhibit A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served by electronic transmission upon the parties below this 27th day of March 2017.

/s/ Christopher Healey _____

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Summary: Memorandum Memorandum Contra Motion of FirstEnergy to Strike Portions of the Office of the Ohio Consumers' Counsel Post-Hearing Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.