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

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

I. INTRODUCTION

In its opposition to the Companies' Motion to Strike, OHA admits that each of the hospital letters it attempts to rely upon was submitted as a public comment after the close of the record in this proceeding. Moreover, OHA disputes neither its failure to present any evidence at hearing to support its argument that some hospitals may want OHA to continue as a program administrator, nor that the letters at issue constitute hearsay. Nevertheless, OHA asks the Commission to deny the Companies' Motion by relying on a distinguishable Commission decision, an erroneous conclusion about the applicability of the hearsay rules, and a misunderstanding of how administrative notice operates. Put simply, and as set forth in detail below, OHA's after-the-fact reliance on the letters is improper.

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

II. LAW & ARGUMENT

A. The Letters At Issue Were Filed After The Attorney Examiner Closed The Record, And OHA Presented No Evidence Related To Hospital Support.

Tellingly, OHA does not deny that the letters it attempts to rely upon were filed as public comments ***after the close of the record*** in this proceeding.[1] Indeed, it is beyond dispute that each of the letters was submitted as a public comment well after Attorney Examiner Bulgrin formally closed the record.[2] Nor does OHA dispute the fact that it failed to present ***any direct evidence*** in this case supporting its contention that hospitals endorse OHA's participation as a program administrator.[3] Despite these uncontroverted facts, OHA asks the Commission to deny the Companies' Motion and allow OHA to rely on untested letters that are not in the record. OHA presents three arguments in support of its position, each of which should be rejected.

First, OHA argues that its reliance on the hospital letters is appropriate because the Commission has a website that "encourages" customers to submit comments regarding concerns those customers have "with the rates and/or services of their public utility."[4] This argument misses the point. The website referenced by OHA is a "Contact Us" form designed to inform customers that the Commission "can help resolve disputes between [the consumer] and utility companies in the industries of electric, natural gas, telephone, water and household goods moving."[5] The website clearly directs utility customers to first "contact the utility . . . [to] give

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[1] *See generally,* Case No. 16-0743-EL-POR, The Ohio Hospital Association's Memorandum Contra Motion to Strike (Mar. 23, 2017) ("OHA's Mem. Contra").

[2] The record was closed on January 31, 2017. *See* Hearing Tr. Vol. V at 636:6-8 ("Anything further? Well then, ***this record will be closed and submitted*** for the Commission's decision.") (emphasis added). The letters at issue, however, were not submitted as public comments until February 21, 2017 (MetroHealth and Ohio Society for Healthcare Facilities Management) and March 3, 2017 (Lake Health). Since post-hearing briefing closed on March 3, another hospital letter was submitted on March 8, 2017 (University Hospitals Health System). While OHA's briefing does not reference or rely upon the University Hospitals letter, OHA improperly attaches that letter to its Memorandum Contra.

[3] *See generally,* OHA's Mem. Contra.

[4] OHA's Mem. Contra at 2 (citing https://www.puco.ohio.gov/contact-us/contact-us-form/?intype=comment).

[5] *See* https://www.puco.ohio.gov/contact-us/contact-us-form/?intype=comment.

them the opportunity to resolve the matter [] directly."[6] While the public is permitted to submit comments relating to such disputes, comments submitted through the website cannot be characterized as record evidence. OHA's assertion to the contrary is simply wrong.

Second, OHA cites the Companies' most-recent ESP case, arguing that the Companies themselves "encouraged various individuals and organizations to file letters in support of [their] ESP."[7] That argument also fails. In that case, the Commission merely noted the existence of public comments in its Opinion and Order—it ***did not*** rely on those comments or even discuss them in substance.[8] Moreover, and unlike OHA in this proceeding, the Companies did not rely on the public comments to support their case.[9] To the contrary, the Companies vigorously participated in the ESP proceedings through the introduction of direct testimony, through cross-examination, and through participation in the lengthy post-hearing briefing process.[10] OHA's rhetoric that the Companies "should not be allowed to benefit from public comments in one case, while seeking to silence the public in another" is misleading and should be disregarded.[11]

Third, OHA points to a single case in support of its argument that it should be permitted to rely ***solely*** on letters not in evidence while ignoring the well-established hearing process for adducing and testing evidence in a Commission proceeding. Specifically, OHA cites *Ohio*

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[6] *Id.*
[7] OHA's Mem. Contra at 3.
[8] *See In the Matter of the Application of [the Companies] 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 and Order at 12 (Mar. 31, 2016) (noting that "[a] large number of public comments were filed in the docket of this case") ("Case No. 14-1297-EL-SSO").
[9] Indeed, the Companies did not even cite or rely on public comments in their post-hearing briefing. *See generally* Case No. 14-1297-EL-SSO, Post-Hearing Brief of [The Companies] (Feb. 16, 2016) and Post-Hearing Reply Brief of [The Companies] (Feb. 26, 2016).
[10] *See generally* docket in Case No. 14-1297-EL-SSO.
[11] OHA's Mem. Contra at 3.

Power, asserting that the Commission in that case relied on public comments in an entry on rehearing.[12] OHA's reliance on that case is unpersuasive for several reasons.

The Commission in *Ohio Power* initially issued an opinion and order modifying and approving a stipulation entered into by AEP-Ohio and several other parties.[13] On rehearing, two intervenors argued that the stipulation should not have been approved because it contained a market transition rider ("MTR") that did not satisfy the applicable legal standards, as it did not "have the effect of stabilizing or providing rate certainty for retail electric service."[14] In response, AEP-Ohio pointed both to evidence in the record that "the MTR was designed to limit changes in rates for all customer classes," as well as to evidence "regarding the rate impacts of the Stipulation upon customers."[15] In its decision on rehearing, the Commission referenced correspondence from customers that reflected actual "total bill rate increases," recognizing that customer bills "undermine[d] the evidence presented by [AEP-Ohio and] the signatory parties that the MTR . . . provide[d] rate certainty and stability" as required under Ohio law.[16]

Specifically, the Commission found that the customer letters demonstrated that "the evidence in the record inadvertently failed to present a full and accurate portrayal of the actual bill impacts to be felt by customers."[17] While the Commission initially expected bill increases to "approach 30 percent," the bills showed that "the actual impacts suffered by a significant number of [] customers appear to have vastly exceeded AEP-Ohio's representations at hearing."[18] In

[12] OHA's Mem. Contra at 2 (citing *In the Matter of the Application of Columbus Southern Power Company and 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. 11-346-EL-SSO et al., Entry on Rehearing (Feb. 23, 2012) ("*Ohio Power*")).
[13] *Ohio Power*, Entry on Rehearing at 2 (Feb. 23, 2012).
[14] *Id.* at 8-9.
[15] *Id.* at 10-11.
[16] *Id.* at 11.
[17] *Id.*
[18] *Id.*

other words, the Commission looked at customer bills because the "total bill rate increases [were] disproportionately higher than the 30 percent predicted by AEP-Ohio."[19]

The unique circumstances that led the Commission to rely on the actual customer bills in *Ohio Power* do not exist in this proceeding. As an initial matter, *Ohio Power* involved the consideration of customer bills from AEP-Ohio that affirmatively and unquestionably disproved and debunked key evidence introduced by AEP-Ohio and the other signatory parties at the hearing in that matter. Since the bills came from AEP-Ohio itself, there could be no question as to their validity, and AEP-Ohio did not need cross-examination. Here, that is plainly not the case. Indeed, there is no suggestion that the Signatory Parties in this case failed to somehow "present a full and accurate portrayal" of the Stipulation and/or the Revised Plans. Nor do the letters OHA attempts to rely upon contain information that came from the Companies themselves.

Furthermore, it is unclear whether the Commission in *Ohio Power* even relied on customer information that was submitted as a "public comment." To be sure, many customers filed public comments in *Ohio Power*. However, numerous letters from customers with bill information were also actually ***filed on the docket*** for that case,[20] which is likely why the Commission noted that customers filed correspondence "in the case record of th[e] proceeding."[21] Notably, the Commission did not reference or cite a single specific public comment in *Ohio Power*. Thus, OHA's speculation that the Commission relied on public comments (as opposed to actual docket filings) is unsupported.

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[19] *Id.*
[20] *See generally* docket in *Ohio Power*, Case No. 11-346-EL-SSO, including customer correspondence filed on February 27, 2012, February 28, 2012, March 2, 2012, March 7, 2012, and March 23, 2012.
[21] *Ohio Power*, Entry on Rehearing at 11 (Feb. 23, 2012).

In short, OHA cannot circumvent the well-settled rule that "new information should not be introduced ***after*** the closure of the record."[22] Indeed, as the Commission held, 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."[23] If OHA wanted to present evidence that certain hospitals within the Companies' service territories support OHA's participation as a program administrator, it should have done so at the evidentiary hearing.[24]

B. OHA Does Not Dispute That The Letters Are Hearsay.

OHA appears to concede that the hospital letters at issue do, in fact, constitute hearsay. Indeed, OHA fails to provide a single argument to the contrary, instead contending that "the Commission is not bound by the rules of evidence."[25] OHA also asserts that the Commission can simply address the issue by "tak[ing] administrative notice of the hospital letters" at this juncture, despite the fact the record in this proceeding closed weeks before any of the letters were even drafted. These arguments should be rejected.

First, OHA's assertion that the Commission is not bound by the Rules of Evidence is immaterial, as it is beyond dispute that the Commission generally adheres to certain evidentiary principles, such as the hearsay rule. The Commission has expressly recognized that "[t]he Supreme Court of Ohio seems to say [] that the admission of out-of-court statements in

[22] Case No. 14-1297-EL-SSO, Opinion and Order at 37 (Mar. 31 2016) (emphasis added).
[23] *See In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-0786-TR-CVF, Opinion and Order at 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) ("Case No. 06-0786-TR-CVF").
[24] *See* O.A.C. § 4901-1-27(C) (permitting "members of the public that are not parties to the proceeding[] the opportunity to offer testimony at the portion or session of the hearing designated for the taking of public testimony").
[25] OHA's Mem. Contra at 3 (citing *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288 (1982)).

administrative proceedings, with no guarantee of trustworthiness, is not justifiable."[26] Indeed, the Commission routinely applies the hearsay rule to exclude documents and testimony from evidence in administrative proceedings—including unauthenticated letters from third parties such as the ones at hand.[27] Therefore, while the Commission "is not stringently confined by the Rules of Evidence,"[28] the application of the hearsay rule in its proceedings is firmly established.

Applying the hearsay rule in Commission proceedings makes perfect sense, as permitting out-of-court statements, such as the letters OHA seeks to rely upon, would preclude opponents like the Companies and Signatory Parties from challenging such statements through cross-examination. For instance, each of the hospital letters at issue makes unsupported assertions regarding alleged obstacles to participation in the Companies' rebate programs if OHA is not an administrator.[29] However, through cross-examination, the Companies could have inquired into the hospitals' 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

[26] *In the Matter of the Application of Delmas Conley, d/b/a Conley Trucking for A Contract Motor Carrier Permit*, Case No. 90-1568-TR-ACO, 1991 WL 11808854, Entry at ¶ 10 (Ohio P.U.C. Oct. 24, 1991) (citations omitted),
[27] *See, e.g.*, *id.* at ¶ 11 ("Accordingly, the examiner first finds that the letters are inadmissible because they represent hearsay evidence."); *In the Matter of the Application of Cincinnati Bell Inc. for Auth. to Adjust Its Rates & Charges & to Change Its Tariffs*., Case No. 81-1338-TP-AIR, 1983 WL 887740, Order on Rehearing at 1 (Ohio P.U.C. June 29, 1983) ("More importantly, both letters are clearly inadmissible hearsay: they represent communications between individuals who are unavailable for cross-examination on the truth of the matters asserted."); *see also* Case No. 14-1297-EL-SSO, Opinion and Order at 34 (Mar. 31, 2016) (holding that certain "testimony also constituted hearsay and could have been stricken on those grounds"); *In the Matter of the Application of Champaign Wind, LLC, for A Certificate to Construct A Wind-Powered Elec. Generating Facility in Champaign Cty., Ohio*, Case No. 12-160-EL-BGN, Opinion, Order, and Certificate at 10-11 (May 28, 2013) (excluding witness testimony as "inadmissible hearsay") ("Case No. 12-160-EL-BGN"); Case No. 06-786-TR-CVF, Opinion and Order at 2, 5 (Nov. 21, 2006) (ruling that an affidavit was "hearsay, not excused by any exception to the rules of evidence governing hearsay, and [wa]s inadmissible as evidence"); *In the Matter of the Complaint of S.G. Foods, Inc., Pak Yan Lui, and John Summers*, Case No. 04-28-EL-CSS et al., Entry at ¶ 71 (Mar. 7, 2006) ("[T]he Commission will not allow admission of the task force report as a hearsay exception.") ("Case No. 04-28-EL-CSS").
[28] *Greater Cleveland.*, 2 Ohio St.3d at 68.
[29] *See, e.g.*, OHA's Mem. Contra at Attachment A.

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.[30]

Second, OHA incorrectly argues that "the Commission can take administrative notice of the hospital letters."[31] The record in this case was closed nearly two months ago,[32] and it is far too late for OHA to seek administrative notice of the letters at issue. Indeed, the Commission has held that it is inappropriate to take administrative notice of information ***after the record is closed***, as doing so would prejudice and harm parties by "allowing a party to supplement the record in a misleading manner."[33]

Moreover, even if the record was still open, it would not be appropriate for the Commission to take administrative notice of the letters at issue because administrative notice is only appropriate when a fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the [adjudicating body] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[34] Here, that is simply not the case. The statements contained in the hospital letters on which OHA seeks to rely are not "generally known" or "capable of accurate and ready determination"—indeed, the Companies dispute their accuracy.

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[30] OHA's assertion that the Commission considered certain materials in *Ohio Power* "notwithstanding issues regarding [] 'admissibility'" is wrong. OHA's Mem. Contra at 3. The admissibility of the customer materials in *Ohio Power* was not at issue and was thus never discussed by the Commission in that case. *See Ohio Power*, Entry on Rehearing at 10-11 (Feb. 23, 2012).

[31] OHA's Mem. Contra at 3.

[32] *See* Hearing Tr. Vol. V at 636:6-8 (closing record on January 31, 2017).

[33] *Ohio Power,* Opinion and Order at 12-13 (Aug. 8, 2012) (stating that requests to take administrative notice after the close of the record are "troublesome and problematic").

[34] *In the Matter of the Regulation of the Elec. Fuel Component Contained Within the Rate Schedules of the Ohio Edison Co. & Related Matters*, Case No. 82-164-EL-EFC, 1983 WL 886799, Opinion and Order at 1 (Ohio P.U.C. Aug. 3, 1983) (holding that "[t]he Commission believes the guidelines for determining whether administrative notice should be taken are the same as those set forth for judicial notice in Ohio Evidence Rule 201"); *see also In the Matter of the Investigation into the Perry Nuclear Power Station*., Case No. 85-521-EL-COI, 1987 WL 1466935, Entry at ¶ 6 (Ohio P.U.C. Apr. 21, 1987) (refusing to take administrative notice of a fact based on Ohio Evidence Rule 201).

Further, OHA's reliance on the FERC filing in *Ohio Power* as support for its administrative notice argument is unconvincing.[35] The Commission in that case approved a "generation asset divestiture" for AEP-Ohio based on its understanding that "AEP-Ohio would place all of its current . . . generation assets into the 2015 base residual auction, pursuant to the plain language of the Stipulation" and based on "the testimony of two of the Signatory Parties' primary witnesses."[36] On rehearing, however, the Commission took administrative notice of AEP-Ohio's FERC filing and determined that it "[wa]s inconsistent with the intent of the Commission" because "it fail[ed] to ensure that all generation assets currently owned by AEP-Ohio will be bid into the upcoming base residual auction."[37] Taking administrative notice of the FERC filing did not prejudice AEP-Ohio, since the filing at issue was authored by AEP-Ohio and, thus, the company did not need an opportunity to respond through cross-examination.[38] That is certainly not the case here, as the hospital letters were drafted by third parties that are not part of this proceeding and have not been subjected to cross-examination.

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

C. OHA's Conditional Support Of OCC And Staff's Joint Motion To Strike Is Inappropriate.

OHA asserts in its brief that the Commission should "grant the Office of Ohio Consumers' Counsel's and Commission Staff's joint motion to strike portions of [the

[35] OHA's Mem. Contra at 3.
[36] *Ohio Power*, Entry on Rehearing at 5, 8 (Feb. 23, 2012).
[37] *Id.* at 8.
[38] *See In the Matter of [The Companies] for Authority to Provide for A Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 19 (July 18, 2012) (recognizing propriety of administrative notice where "complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction") ("Case No. 12-1230-EL-SSO").

Companies'] post-hearing brief" if it strikes OHA's reliance on the hospital letters.[39] OHA's conditional support of OCC and Staff's joint motion is inappropriate and should be rejected out of hand. As an initial matter, OHA did not join OCC and Staff's motion. Moreover, the Commission should adjudicate the distinct motions presented based on the factual and legal merits of those individual motions—not based on how it decides unrelated motions. In any event, OHA's arguments related to OCC and Staff's joint motion fail for the same reasons set forth in the Companies' opposition to that motion, which are incorporated herein by reference.[40]

III. CONCLUSION

For the foregoing reasons, as well as for those set forth in the Companies' Motion to Strike and Memorandum in Support, 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.

[39] OHA's Mem. Contra at 3-4.
[40] *See generally* Case No. 16-0743-EL-POR, The Companies' Opposition to OCC/Staff's Motion to Strike Portions of the Companies' Post-Hearing Briefs (Mar. 30, 2017).

March 30, 2017

Respectfully submitted,

/s/ *Erika Ostrowski*
Carrie M. Dunn (#0076952)
Counsel of Record
Erika Ostrowski (#0084579)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: 330-761-2352
Facsimile: 330-384-3875
cdunn@firstenergycorp.com
eostrowski@firstenergycorp.com

Kathy J. Kolich (#0038855)
Kolich & Associates, LLC
1521 Hightower Drive
Uniontown, Ohio 44685
Telephone: 330-316-2378
kjklaw@yahoo.com

Michael R. Gladman (#0059797)
Sergio A. Tostado (#0088376)
JONES DAY
325 John H. McConnell Blvd.,
Suite 600
Columbus, Ohio 43215
Telephone: 614-281-3865
Facsimile: 614-451-4196
mrgladman@jonesday.com
stostado@jonesday.com

Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of The Companies' Motion To Strike Portions Of The Ohio Hospital Association's Post-Hearing Briefing* will be served on this 30th 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:

Colleen L. Mooney cmooney@ohiopartners.org Ohio Partners for Affordable Energy	Samantha Williams swilliams@nrdc.com Robert Dove rdove@attorneydove.com Natural Resources Defense Council
Christopher Healey christopher.healey@occ.ohio.gov Dane Stinson DStinson@bricker.com Ohio Consumers' Counsel	Kimberly W. Bojko bojko@carpenterlipps.com James Perko perko@carpenterlipps.com, Ohio Manufacturers Association Energy Group
Madeline P. Fleisher mfleisher@elpc.org Robert Kelter rkelter@elpc.org Environmental Law and Policy Center	Matthew R. Pritchard mpritchard@mwncmh.com Samuel Randazzo sam@mwncmh.com Industrial Energy Users of Ohio
Angela Paul Whitfield paul@carpenterlipps.com Counsel for The Kroger Company	Richard L. Sites ricks@ohanet.org Matthew W. Warnock mwarnock@bricker.com Dylan F. Borchers dborchers@bricker.com

	Devin Parram dparram@bricker.com Teresa Orahood torahood@bricker.com The Ohio Hospital Association
Joseph E. Oliker joliker@igsenergy.com IGS Energy	Trent A. Dougherty tdougherty@theoec.org Miranda Leppla mleppla@theoec.org Ohio Environmental Council
John Finnigan jfinnigan@edf.org Environmental Defense Fund	Christopher J. Allwein callwein@keglerbrown.com Energy Management Solutions, Inc.
Joel E. Sechler sechler@carpenterlipps.com EnerNOC, Inc.	Natalia Messenger Natalia.Messenger@ohioattorneygeneral.gov John Jones john.jones@ohioattorneygeneral.gov Ohio Attorney General for PUCO Staff
Debra Hight Debra.Hight@puc.state.oh.us Vesta Miller Vesta.Miller@puc.state.oh.us Sandra Coffey Sandra.Coffey@puc.state.oh.us Public Utilities Commission of Ohio	

/s/ Erika Ostrowski
An Attorney for Applicant Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

NAI-1502592657

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