

**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.)	

**REPLY IN SUPPORT OF MOTION TO STRIKE PORTIONS OF THE POST-
HEARING BRIEFS OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY**

**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO should grant the PUCO Staff's and the Office of the Ohio Consumers' Counsel's ("OCC") motion to strike portions of FirstEnergy's post-hearing briefs.¹ In its briefs, FirstEnergy repeatedly relied on facts not in evidence. As explained in the Motion to Strike, this violates PUCO precedent.

FirstEnergy's memorandum contra² (i) relies on arguments that are unsupported by the evidentiary record and PUCO precedent, (ii) effectively concedes that some of the PUCO Staff's and OCC's requests to strike FirstEnergy's briefs are well-taken, and (iii) otherwise miscomprehends the nature of the PUCO Staff's and OCC's requests to strike its briefs. The PUCO should reject the arguments in the Memo Contra and should grant the Motion to Strike.

¹ Motion to Strike Portions of the Post-Hearing Briefs of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (Mar. 15, 2017) (the "Motion to Strike").

² [FirstEnergy's] Memorandum Contra to OCC/Staff's Motion to Strike Portions of the Companies' Post-Hearing Briefs (Mar. 30, 2017) (the "Memo Contra").

I. REPLY

A. FirstEnergy's statements regarding the settlement in this case are not based on record evidence.

In the Motion to Strike, the PUCO Staff and OCC explained that FirstEnergy's references to certain settlement communications should be struck because they are not based on record evidence.³ FirstEnergy, in its Memo Contra, did not respond to this argument. Instead, FirstEnergy focused only on whether these communications were confidential settlement communications.⁴ FirstEnergy did not respond to the PUCO Staff's and OCC's assertion that its statements rely on facts not in evidence.

On page 12 of its initial brief, FirstEnergy stated that the PUCO Staff "chose not to substantively participate in" certain settlement discussions.⁵ FirstEnergy did not cite anything in the record for this statement. Indeed, there is no record evidence regarding whether the PUCO Staff did or did not participate in specific settlement discussions. FirstEnergy also claimed that parties made "various requests for Staff input on the Companies' Proposed Plans."⁶ Again, FirstEnergy did not cite anything in the record for this statement because there is no record evidence that any party made various requests for the PUCO Staff to provide input on FirstEnergy's Settlement. FirstEnergy claimed, in its initial brief, that it "left intact multiple provisions in the Stipulation negotiated by those parties" [referring to OCC and OHA].⁷ As before, FirstEnergy did not cite the record for these unsubstantiated claims. There is nothing in the record regarding what

³ Id.

⁴ Memo Contra at 1-4.

⁵ Post-Hearing Brief of [FirstEnergy] in Support of the Stipulation and Recommendation at 12 (Mar. 21, 2017) (the "FirstEnergy Initial Brief").

⁶ Id.

⁷ FirstEnergy Initial Brief at 34, n. 152.

provisions in the Settlement OCC or OHA did or did not attempt to negotiate.

FirstEnergy's Memo Contra does not address this shortcoming.

Instead, FirstEnergy focuses only on whether these statements are confidential settlement communications. But whether confidential or not, these statements are not based on record evidence. FirstEnergy's Memo Contra does not assert that these statements are based on record evidence—because they aren't. The PUCO should strike these statements, which are not based on the record in this case.

B. FirstEnergy effectively concedes that certain portions of its briefs should be struck.

FirstEnergy's Memo Contra does not address the PUCO Staff's and OCC's request to strike certain portions of its briefs.

In its initial brief, FirstEnergy claimed that "EDUs do not typically oppose Staff's motions on procedural issues such as scheduling."⁸ In its reply brief, FirstEnergy repeated this refrain.⁹ FirstEnergy did not cite any record evidence for this statement because there is none.¹⁰

In its initial brief, FirstEnergy claimed that the PUCO Staff and OCC made an "oral request" to continue the December 12, 2016 hearing date.¹¹ FirstEnergy also claimed that it "expressed [its] concern regarding further delay and asked that the hearing

⁸ FirstEnergy Initial Brief at 48 n. 221.

⁹ Post-Hearing Reply Brief of [FirstEnergy] in Support of the Stipulation & Recommendation at 36 (Mar. 3, 2017).

¹⁰ Indeed, the statement is false. In FirstEnergy's current electric security plan case, FirstEnergy filed a memorandum contra the PUCO Staff's motion for continuance. See [FirstEnergy's] Memorandum Contra the Motion to Continue of the Staff of the Public Utilities Commission of Ohio, Case No. 14-1297-EL-SSO (Feb. 4, 2017). See also Case No. 16-576-EL-POR (Duke Energy Ohio opposing the PUCO Staff's procedural requests on three separate occasions).

¹¹ FirstEnergy Initial Brief at 48.

not be pushed into late January."¹² FirstEnergy continued, stating that the PUCO Staff "persisted that the hearing should not be set prior to the week of January 23, 2017."¹³ FirstEnergy did not cite any record evidence for these statements because there is none.

FirstEnergy also relied in its reply brief on certain information from a settlement filed in a 2011 case involving AEP Ohio.¹⁴ This AEP settlement is not in the record in this case, and no party sought to introduce it into the record.

FirstEnergy's Memo Contra does not address the PUCO Staff's and OCC's request to strike these portions of its briefs. There is therefore no dispute that these statements found in FirstEnergy's briefs are not based on record evidence. The PUCO should grant the PUCO Staff's and OCC's motion to strike these portions of FirstEnergy's briefs.

C. FirstEnergy confuses citations to the docket *card* with citations to the *substance* of individual docket *entries*.

FirstEnergy's initial brief and reply brief cite to the substance of various parties' motions to intervene in this case in support of FirstEnergy's claim that the parties represent diverse interests.¹⁵ In the Motion to Strike, the PUCO Staff and OCC explained that these motions to intervene were not admitted into the record in this case.¹⁶

In response, FirstEnergy claims that its reliance on the substance of various parties' motions to intervene is proper because the docket card in this case was admitted into evidence.¹⁷ FirstEnergy's argument is unavailing because it fails to distinguish

¹² Id.

¹³ Id. at 48-49.

¹⁴ See FirstEnergy Reply Brief at 43.

¹⁵ FirstEnergy Initial Brief at 34-35, 35 n. 153-59; FirstEnergy Reply Brief at 6-7, 6-7 n. 29-34.

¹⁶ Motion to Strike at 5.

¹⁷ Memo Contra at 8.

between OCC's citations to the *docket card* and FirstEnergy's citations to the actual *substance* of docket filings that were not themselves admitted into the record.

OCC Exhibit 3 in this case is a printout of the docket card from this case, as of January 22, 2017. In its initial brief and reply brief, OCC cited various documents filed on the docket and relied only on information about those documents that could be gleaned from the docket card itself. For example, OCC noted that on September 29, 2016, the PUCO Staff filed a motion for continuance.¹⁸ This can be discerned by looking at OCC Exhibit 3, which was admitted into the record; it did not require OCC to look at the motion itself, which was not admitted into the record. Likewise, OCC noted that FirstEnergy did not file an objection to this PUCO Staff Motion.¹⁹ Again, this statement can be confirmed simply by looking at OCC Exhibit 3. And as FirstEnergy points out in its Memo Contra, the Attorney Examiner in this case stated that parties "can look at the *docket card*" and make any appropriate arguments.²⁰

In contrast, FirstEnergy cited various motions to intervene in this case and relied on the actual substance of those motions to intervene. The statements that FirstEnergy made in its briefs regarding the various parties' interests cannot be found on OCC Exhibit 3. Instead, to find the information that FirstEnergy relies upon, one must look at the motions to intervene themselves, none of which were admitted into the record.

The PUCO addressed a similar issue in a recent case involving Columbia Gas.²¹ There, the utility cited to the substance of certain documents filed on the docket in that

¹⁸ OCC Initial Brief at 25-26.

¹⁹ Id. at 26.

²⁰ See Memo Contra at 6 (quoting Tr. at 438:3-5) (emphasis added).

²¹ Case No. 16-1309-GA-UNC.

case, and OCC moved to strike.²² The PUCO granted OCC's motion to strike on the grounds that motions filed on the docket in the same case are not automatically part of the evidentiary record; instead, they must be affirmatively admitted into the record or administratively noticed.²³ For the same reason, FirstEnergy's reliance on the substance of motions to intervene in this case is improper.

D. FirstEnergy's statements explaining *why* signatory parties to the Settlement may or may not have agreed to certain terms are not based on record evidence.

Several times in its briefs, FirstEnergy made statements not just about the substance of its filed Settlement but about the signatory parties' *reasoning* for including or excluding certain terms in the Settlement. For example, FirstEnergy made the legal argument that the amended shared savings trigger is reasonable because FirstEnergy's "lost opportunity" to charge customers for shared savings "was not the result of [FirstEnergy's] own doing."²⁴ But then FirstEnergy concludes: "This is precisely why the Signatory Parties agreed to include the Amended Trigger provision in the Stipulation."²⁵ The record does not support the unfounded conclusion.

FirstEnergy also notes in its initial brief that "no intervenor in this proceeding other than OCC has come forward in support of the" PUCO Staff's cost cap proposal.²⁶ But then FirstEnergy concludes: "That is because Staff's Cost Cap Proposal exceeds the

²² Opinion & Order ¶ 33 (Dec. 21, 2016).

²³ Id. ¶ 35.

²⁴ FirstEnergy Initial Brief at 49.

²⁵ Id.

²⁶ FirstEnergy Initial Brief at 58.

Commission's statutory and regulatory authority, needlessly duplicates existing cost-control measures, and arbitrarily impacts and prejudices the Companies."²⁷

There is nothing in the record explaining *why* the signatory parties chose to sign the settlement. And there is no evidence whether the other signatory parties agree with FirstEnergy's legal arguments. Likewise, there is nothing in the record explaining *why* any signatory party chose to support or not support the PUCO Staff's cost cap proposal. FirstEnergy's attempt to put words into the mouths of the signatory parties should be rejected. The terms of the Settlement speak for themselves. Indeed, the Settlement itself states that it "is not intended to reflect the views or proposals which any individual party may have advanced acting unilaterally."²⁸

In its Memo Contra, FirstEnergy misses the point. FirstEnergy focuses on the mere fact that no other intervenor has come forward to support the PUCO Staff's and OCC's cost cap proposal.²⁹ OCC and the PUCO Staff do not seek to strike this bare conclusion. They instead seek to strike FirstEnergy's attempt to explain *why* parties may have chosen to sign the Settlement and *why* parties did or did not support the proposal for a cost cap. There is nothing in the evidentiary record showing that the signatory parties agreed with FirstEnergy's legal theories. FirstEnergy's suggestions to the contrary should be struck.

²⁷ Id.

²⁸ Settlement at 3.

²⁹ Memo Contra at 9.

II. CONCLUSION

FirstEnergy's briefs rely on information that is not part of the record in this case. This violates PUCO precedent and is unfair to all parties that participated in the PUCO's administrative process in this proceeding. The PUCO should grant OCC's and the PUCO Staff's Motion to Strike.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-9571
christopher.healey@occ.ohio.gov
(Will accept email service)

Dane Stinson (0019101)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-4854
dstinson@bricker.com
(Will accept email service)

Outside Counsel for the Office of the Ohio
Consumers' Counsel

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply was served by electronic transmission upon the parties below this 6th day of April 2017.

/s/ Christopher Healey _____

Christopher Healey
Assistant Consumers' Counsel

SERVICE LIST

mfleisher@elpc.org
tdougherty@theOEC.org
mleppla@theoec.org
cmooney@ohiopartners.org
ricks@ohanet.org
mwarnock@bricker.com
dborchers@bricker.com
dparram@bricker.com
mpritchard@mwncmh.com
sechler@carpenterlipps.com
callwein@keglerbrown.com
John.jones@ohioattorneygeneral.gov

Attorney Examiner:

Richard.Bulgrin@puc.state.oh.us

cdunn@firstenergycorp.com
eostrowski@firstenergycorp.com
leiterr@firstenergycorp.com
Kjklaw@yahoo.com
mrgladman@jonesday.com
stostado@jonesday.com
jfinnigan@edf.org
rdove@attorneydove.com
Bojko@carpenterlipps.com
perko@carpenterlipps.com
paul@carpenterlipps.com
rkelter@elpc.org
joliker@igsenergy.com
swilliams@nrdc.org

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/6/2017 4:33:33 PM

in

Case No(s). 16-0743-EL-POR

Summary: Reply Reply in Support of Motion to Strike Portions of the Post-Hearing Briefs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company by the Office of the Ohio Consumers' Counsel
electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.