

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio :
Edison Company, The Cleveland Electric : Case No. 16-743-EL-POR
Illuminating Company, and The Toledo :
Edison Company for Approval of Their :
Energy Efficiency and Peak Demand :
Reduction Program Portfolio Plans for :
2017 through 2019. :

**REPLY MEMORANDUM TO OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND
THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA TO
OCC/STAFF'S MOTION TO STRIKE PORTIONS OF THE COMPANIES'
POST-HEARING BRIEFS
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**On behalf of the Staff of
The Public Utilities Commission of Ohio**

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INTRODUCTION

The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, the "Companies") memorandum contra to OCC/Staff's motion to strike fails to provide a compelling argument for the Public Utilities Commission of Ohio ("Commission") to deny the motion to strike their non-record statements pursuant to its established rules and precedent. The authority cited and relied upon by OCC and Staff is on point and favors the movants here. The Companies' continue to rely on non-record evidence in citing other *parties' briefs* in their memorandum contra as further evidence in support of their non-record statements that are subject to the motion to strike.¹ The Commission should strike the portions of their briefs that rely on information that was not introduced and admitted into evidence. Based on OCC/Staff's motion to strike and Staff's reply below, the Commission should grant the motion to strike in its entirety.

¹ Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of The Companies' Post-Hearing Briefs", Case No. 16-0743-EL-POR (March 30, 2017) at 6, fns. 20-21, 9, fns. 32-33, 10, fns. 35-37.

ARGUMENT

A. The Commission should strike the Companies' statements alleging Staff's lack of meaningful participation in the settlement process because they constitute improper commentary and judgment/opinion of counsel not in evidence and constitute evidence of inadmissible confidential settlement communications.

In their Initial Brief, the Companies improperly express their opinion on whether Staff meaningfully participated in settlement discussions.² These references are non-record information, which is improper and violates Commission rules and precedent.³ The Commission has rejected efforts by parties to include information in a brief that is not part of the record.⁴ The statement here about Staff's conduct during the settlement negotiations is commentary and judgment or opinion of counsel for the Companies injected in their brief to bolster their legal position and proposals. Staff is clearly prejudiced by these statements because at no time prior to briefing were these statements made known to Staff or made part of the record. Staff had no opportunity to rebut or challenge these statements through cross examination.

² *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. 16-743-EL-POR (Companies' Post-Hearing Brief at 12) (Feb. 21, 2017) ("Initial Brief").

³ *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. 16-743-EL-POR (Companies' Post-Hearing Brief at 12) (Feb. 21, 2017) ("Initial Brief").

⁴ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand Side Management Program for its Residential and Commercial Customers*, Case Nos. 16-1309-GA-UNC et al. (Opinion and Order at 14-17) (December 21, 2016) (Commission granted OCC's motion to strike portions of Columbia's reply brief regarding information not introduced and admitted in the record that included Columbia's interpretation of its application).

Allowing counsel to make statements and judgments on the conduct of other parties during settlement negotiations in briefing that are not part of the record of evidence will set a dangerous new precedent. Portions of the Companies' Initial Brief that reference this information should be stricken, consistent with Commission precedent.

Moreover, and perhaps more importantly, settlement communications between parties to Commission proceedings are confidential. The Commission's rules plainly state: "Evidence of conduct or statements made in compromise negotiations is . . . not admissible."⁵ The plain language of that rule establishes that the Companies' statements are not admissible and should be stricken. Relying on this rule, the Commission previously stated "it will not consider the parties' . . . efforts to resolve this dispute as evidence" and "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."⁶ The Companies' statements go to Staff's conduct during settlement discussions. Therefore, any statements made by the Companies regarding how meaningful Staff's participation was during settlement discussions should be stricken from the Initial Brief.

The Companies' argue that the statements are permissible because they address whether the stipulation is the product of serious bargaining one of the prongs of the Commission's three-prong test for evaluating a stipulation. This argument is without merit. While the Commission does consider whether parties were invited to participate in settlement discussions and had the opportunity to represent their interests, it does not

⁵ Ohio Adm. Code 4901-1-26(E).

⁶ *In re Complaint of Karl Friedrich Jentgen v. Ohio Edison Co.*, Case No. 15-245-EL-CSS (Entry on Rehearing ¶ 33) (Dec. 7, 2016).

consider the parties' conduct and statements made at those meetings. The Companies overreach in their argument by not addressing that distinction. The Commission should strike from the Companies' briefs all references to parties' conduct or statements during settlement negotiations.

B. The Commission should strike the Companies' references to non-signatory parties' negotiated positions and Stipulation provisions benefitting non-signatory parties.

For the same reasons, Staff and OCC move to strike the Companies' statements identifying and describing OCC and OHA's settlement negotiations and positions. These parties negotiated the Energy Star benchmarking program and the expansion of participation in EE programs among the Companies' low-income customers.⁷ These are substantive confidential negotiations and positions taken by parties who ultimately decided not to join the Stipulation. Statements made in compromise negotiations are not admissible pursuant to Ohio Adm. Code 4901-1-26 (E). Allowing this information to be cited in briefs could have a chilling effect on parties' negotiations in future cases.

C. The Commission should strike all portions of the Companies' Initial and Reply Briefs that rely on documents filed in the docket but that were not submitted into evidence.

The Commission should strike all of the Companies' references to the motions to intervene and motions for continuances that were filed in the docket of the case, but not introduced and made part of the record of evidence.⁸ The motions cannot be used as

⁷ Initial Brief at 34, fn.152.

⁸ Initial Brief at 35, fns. 153-159; Reply Brief at 6-7, fns. 29-34.

evidence to support the Companies' legal arguments on brief. The motions were not offered or admitted into the evidentiary record. The Companies had the opportunity to seek to introduce the information into the record during the hearing process, when Staff and OCC could test the alleged evidence. No party sought to have it admitted. The portions of the Companies' Initial Brief that cite and rely on these motions should be stricken, consistent with Commission precedent and fairness in Commission proceedings.

The Companies' argue that citations to motions in the case docket but not in evidence are permissible because the Attorney Examiner stated "I think the record is what it is. I think you can look at the docket card and make that argument".⁹ The Companies misinterpret the Attorney Examiner's statement. The docket card is OCC Exhibit 3 and it was admitted in the record of evidence prior to the Attorney Examiner's statement.¹⁰ Also, the Attorney Examiner sustained Staff's objection to prevent the Companies' counsel from cross examining Staff's witness on the topic of delay and Staff's motion for a continuance filed on the docket by stating "so let's move on" to counsel.¹¹ The Attorney Examiner's ruling was consistent with Commission precedent.¹²

⁹ *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. 16-743-EL-POR (Transcript of Proceedings at 438) (Jan. 25, 2017) ("Tr. Vol III").

¹⁰ Tr. Vol. I (January 23, 2017) at 132-133.

¹¹ Tr. Vol. III at 437-438.

¹² *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand Side Management Program for it Residential and Commercial Customers*, Case Nos. 16-1309-GA-UNC et al. (Opinion and Order at 14-17) (December 21, 2016)

Motions to intervene that are on the docket but not in evidence should be treated the same as motions to continue that are on the docket but not in evidence. Both motions are outside of the record of evidence and nobody requested administrative notice to be taken of those motions. The Companies' attempt to distinguish Staff and OCC's cited authority for striking documents on the docket but not in evidence by arguing that those cases strike portions of briefing that rely on information from different Commission dockets and proceedings.¹³ The Companies' argument is without merit because it is a distinction without a difference. The point is documents on the docket are not automatically admitted into the evidentiary record of the same case. Otherwise, Ohio Adm. Code 4901-1-28 (A) and (E) admitting into evidence at the time it is filed any Staff Report of Investigation, would serve no purpose and be nullified by the Companies' argument here. The authority cited by Staff and OCC in their motion to strike is persuasive and controlling authority on this subject.

The Companies' concede that Staff and OCC's motion to strike, in part, has merit by voluntarily withdrawing statements in their Brief that rely on a filing from a 2011 case involving AEP Ohio.¹⁴ The cited document from the 2011 case involving AEP Ohio is

(Commission granted OCC's motion to strike references to joint motion for an extension of the procedural schedule that was not admitted in the evidentiary record).

¹³ Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of The Companies' Post-Hearing Briefs", Case No. 16-0743-EL-POR (March 30, 2017) at 5, fn.12.

¹⁴ Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of The Companies' Post-Hearing Briefs", Case No. 16-0743-EL-POR (March 30, 2017) at 10, fn. 38.

not in the evidentiary record in this case. No party sought admission of this document, and no party had the opportunity to cross examine any witness regarding this document. The Commission should permit the Companies to withdraw this non-record evidence.

For the foregoing reasons and for good cause shown, the Commission should grant Staff and OCC's motion to strike all documents referenced in the Companies' briefs that are on the docket of the case but not introduced and admitted in the evidentiary record.

D. The Companies' statements that Staff caused the proceedings to be delayed have no foundation in the record and constitute improper commentary and judgment/opinion of opposing counsel.

The Companies' references and statements in both their Initial and Reply Briefs accusing Staff of delaying the proceedings should be stricken. The statements¹⁵ are improper and serve no evidentiary value to the Commission. The Companies' are limited to the record of evidence in making their delay argument. Otherwise, allowing the Companies' counsel to become a witness outside of the record and inject conjecture in their briefs sets a bad precedent for future cases and our practice before the Commission. The Companies' counsel attempts to explain why they did or did not do something procedurally in response to another party acting. These explanations and statements are outside of the record and completely inappropriate. None of this information was cited in any documents admitted in the record or testified to by any witness on the witness stand. Neither Staff nor any other party had any opportunity to cross-examine the Companies or their counsel on such statements. Staff requests these parts in the Companies' briefs be stricken for being improper conjecture and outside of the record.

¹⁵

Initial Brief at 48 and fn. 221, 49; Reply Brief at 36 and fns. 192-193..

E. The Companies' observation that other parties did not support Staff's cost cap relies on other parties' briefs.

The Companies cite other parties' briefs to support their argument that the Companies may make references in their Initial Brief to other parties rejecting Staff's cost cap proposal because it exceeded the Commission's statutory and regulatory authority.¹⁶ Briefs are non-record information that cannot be relied on as evidence.

In fact, the Companies cite to the Initial Briefs of the Environmental parties and OPAE to support their previous off the record statements that these parties do not support Staff's cost cap proposal.¹⁷ The Companies also cite their own brief in support of their argument.¹⁸ No evidence was offered or admitted in the record to support these statements made by the Companies. Neither Staff nor OCC had an opportunity to cross-examine the Companies on such statements. These references and statements should be stricken from the Companies' Initial Brief for being improper and information outside of the record of evidence in this case.

The Commission should strike all portions of the Companies' briefs where these references and statements are made.

¹⁶ Initial Brief at 58.

¹⁷ Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of The Companies' Post-Hearing Briefs", Case No. 16-0743-EL-POR (March 30, 2017) at 9, fns. 32-33, 36-37.

¹⁸ Id at fn. 33, 35.

CONCLUSION

For the foregoing reasons, the Commission should grant Staff's and OCC's motion to strike in its entirety.

Respectfully submitted,

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**On behalf of the Staff of
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Memorandum to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of the Companies' Post-Hearing Briefs** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the following Parties of Record, this 6th day of April, 2017.

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Summary: Reply Memorandum to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra to OCC/Staff's Motion to Strike Portions of the Companies' Post Hearing Briefs electronically filed by Ms. Tonnetta Scott on behalf of PUC