

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Suvon, LLC d/b/a FirstEnergy Advisors)	
For Certification as a Competitive Retail)	Case No. 20-0103-EL-AGG
Electric Service Power Broker and)	
Aggregator in Ohio.)	

**REPLY IN SUPPORT OF SUVON, LLC D/B/A FIRSTENERGY ADVISORS' MOTION
TO STRIKE PORTIONS OF THE MOTION TO INTERVENE FILED BY RETAIL
ENERGY SUPPLY ASSOCIATION**

I. INTRODUCTION

Suvon, LLC d/b/a FirstEnergy Advisors separately filed its Motion to Strike and its Memorandum in Opposition the Motion to Intervene filed by Retail Energy Supply Association (“RESA”). These briefs address different issues and therefore it was appropriate to file them separately. RESA made the strategic choice not to respond to the briefs as they were filed and instead consolidated them into one response.

The reason for RESA’s strategic choice is immediately clear. RESA spent only a single paragraph in a nine-page brief addressing the Motion to Strike because it has no way to defend its position. In doing so, RESA concedes the brief includes thirteen pages of “comments” which are inappropriate for a Motion to Intervene. This improper section goes well beyond stating RESA’s legal position and instead provides substantive “comments” and recommendations in this case. This material is well beyond the bounds of a motion to intervene. RESA’s transparent attempt to avoid the Motion to Strike by focusing again on its substantive “comments” should be rejected. Pages three through fifteen of RESA’s Motion to Intervene should be stricken.

Alternatively, the Commission could simply reject RESA’s intervention, as separately requested by FirstEnergy Advisors.

II. ARGUMENT

RESA is entitled to attempt to show: (1) the nature and extent of the prospective intervenor's interest; (2) the legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues; and (5) the extent to which the person's interest is represented by existing parties.¹

The problem with RESA's brief is only the first two pages of its fifteen-page motion address those grounds. The remainder of RESA's Motion to Intervene provides substantive comments which do not plausibly relate to the intervention standards.² In fact, RESA calls this section of its brief its "comments" and then states generally that all thirteen pages relates to the intervention standards without explaining how or which standard(s) the "comments" apply to.³

In the lone paragraph that responds to the Motion to Strike, RESA does not attempt to show how its "comments" relate to the Commission's intervention standard. RESA also ignores the extensive Commission authority *FirstEnergy Advisors* cited that struck irrelevant material in similar circumstances.⁴ As discussed in detail in *FirstEnergy Advisors' Motion to Strike*,

¹ Ohio Admin. Code 4901-1-11(B).

² See Motion at 3–15.

³ RESA Motion to Intervene at 2 ("The remainder of this motion addresses the "nature and extent of the prospective intervenor's interest" as well as "[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case." RESA requests that the Commission take these comments into consideration as it decides next steps.")

⁴ See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Adjust Rider AU for 2016 Grid Modernization Costs*, Case No. 17-690-GA-RDR, Entry (Sept. 14, 2017) (striking in their entirety OCC's comments on Duke's future plans to replace its AMI technology because they were irrelevant in the context of the Rider AU proceeding); see also *In re Section 276 of the Telecommunications Act*, Case No. 96-1310-TP-COI, Entry (Aug. 15, 2003) (noting "it is appropriate to strike as irrelevant any testimony" not related to issues of case).

comments have been struck in their entirety where they were irrelevant to the proceeding,⁵ and deemed better suited to be addressed in another proceeding.⁶

Rather than addressing the cases cited by FirstEnergy Advisors, RESA cites the Ohio Supreme Court for the proposition that motions to strike are not encouraged “over every bit of irrelevant information.”⁷ That is true but irrelevant. In *State ex rel. Repeal Lorain*, the motion to strike was for a single paragraph the movant alleged to be “patently and demonstratively false and scandalous.”⁸ The Supreme Court found that the allegation was not scandalous and at worst was immaterial. The Court declined to strike the single immaterial paragraph from the larger pleading.⁹ That standard is consistent with FirstEnergy Advisors’ position in this proceeding. Several intervenors in this case have asserted isolated paragraphs or arguments which did not directly address the intervention standard. FirstEnergy Advisors did not move to strike every one of those paragraphs or arguments because there were isolated instances. However, RESA’s brief shows a strategic effort to circumvent the Commission’s rules. RESA made no effort to even attempt to tie its “comments” to the intervention standard. RESA should be forced to comply with the same standards applicable to every other prospective intervenor.

RESA then cites an unreported decision from a federal court for the proposition that “[a] motion to strike ‘is a drastic remedy to be resorted to only when required for the purposes of justice.’”¹⁰ An unreported federal decision applying the federal rules of civil procedure is not

⁵ *In re Ohio Power Co.*, Case No. 98-101-EL-EFC, *et al.*, Entry on Rehearing (July 15, 1999) (granting motion to strike information and arguments in memorandum that were irrelevant to intervenors’ stated purpose of countering companies’ application for rehearing and served only to bolster intervenors’ position relative to their own application for rehearing).

⁶ Case No. 17-690-GA-RDR, Entry (Sept. 14, 2017) at ¶ 17.

⁷ RESA Memorandum In Opposition p. 2.

⁸ *State ex rel. Repeal Lorain Cty. Permissive Sales Tax Comm. v. Lorain Cty. Bd. of Elections*, 2017-Ohio-7648, ¶ 6, 151 Ohio St. 3d 247, 248 (2017).

⁹ *Id.*

¹⁰ RESA Memorandum In Opposition at 2.

relevant to the Commission's decision here. However, even if this decision was controlling it does not support RESA. The *Microsoft* court found Fed. R.Civ. P. 12(F) specifically permits motions to strike affirmative defenses if the affirmative defense cannot succeed.¹¹ The *Microsoft* court also cited a reported Northern District case for the proposition that "courts retain 'liberal discretion' to strike filings as they deem appropriate."¹² The *Microsoft* court then concluded that the affirmative defenses which were subject to the motion to strike in that case were in fact deficient.¹³ However, since striking affirmative defenses for a pleading deficiency would be a drastic remedy, and discovery had not yet ended, the Court permitted defendants to amend the affirmative defenses to more clearly state the grounds for the defense.¹⁴ While *Microsoft* chose to require amendment instead of striking the defense completely, the conclusion is the same. Improper affirmative defenses must be removed, or they will prejudice the other party. *Microsoft* does not support RESA's attempt to jam irrelevant information into a motion to intervene.

RESA's next claim is that "Suvon has responded to RESA's motion, so it cannot claim prejudice by the introduction of supposedly 'irrelevant' arguments."¹⁵ This is not the legal standard. RESA may not flout the Commission's rules and policies and inoculate itself from a motion to strike if its opponent points out the flaws in RESA's position. Adopting this standard would authorize RESA to make literally any filing it wanted, completely outside of the Commission's stated procedural process, so long as its opponent responded. There is no policy or legal support for this extreme position, and the Commission should reject it.

¹¹ *Microsoft Corp. v. Lutian*, No. 1:10 CV 1373, 2011 WL 4496531, at *1 (N.D. Ohio Sept. 27, 2011)

¹² *Id.* (citing *In re Keithley Instruments, Inc.*, 599 F.Supp.2d 908, 911 (N.D. Ohio 2009) (citation omitted).)

¹³ *Id.* at *4.

¹⁴ *Id.*

¹⁵ RESA Memorandum In Opposition p. 2.

In the material to be stricken RESA has not attempted to show how RESA is impacted by this case. RESA has not seriously contested that FirstEnergy Advisors is equipped from a technical, managerial, and financial perspective to serve as a broker. Instead, RESA is seeking to litigate other issues in this case while deflecting away from the fact that its own members also use, or have used, the names of affiliated companies, shared service employees, and FirstEnergy Advisors is simply seeking similar treatment to other participants in the Ohio marketplace. As such, there is no undue prejudice to RESA if the material is stricken.

III. CONCLUSION

Because RESA's arguments and additional briefing presented in its motion to intervene have nothing to do with seeking intervention, pages three through fifteen of RESA's brief should be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 15th day of April 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Reply In Support Of Motion To Strike Portions of RESA Motion To Intervene electronically filed by Mr. Trevor Alexander on behalf of Suvon, LLC