

**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. 14-1297-EL-SSO
Edison Company for Authority to Provide for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE
PORTIONS OF THE BRIEF ON REHEARING OF NORTHEAST OHIO PUBLIC
ENERGY COUNCIL**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully move to strike the following portions of the Brief on Rehearing of Northeast Ohio Public Energy Council (“NOPEC”), to wit: page 15, beginning at the start of second full paragraph with the words “The quantitative” and continuing through the entirety of page 16 ending with the word “consumers” and footnotes 48, 49, 50, and 51.

The Commission should strike this material from NOPEC’s brief because it relies on testimony that the Attorney Examiner excluded from the record. For this reason and those set forth in the attached memorandum in support, which is incorporated herein, the Commission should grant this motion and strike the portions of NOPEC’s brief noted above.

Date: August 29, 2016

Respectfully submitted,

/s/ David A. Kutik

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COMPANY, THE CLEVELAND ELECTRIC
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**MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY TO STRIKE PORTIONS OF THE BRIEF ON REHEARING OF
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

I. INTRODUCTION

On pages 15 and 16 of its brief on rehearing, NOPEC discusses at length certain testimony of OCC/NOAC witness Wilson and Sierra Club witness Comings, all of which was stricken by the Attorney Examiner. NOPEC *admits* that this information was excluded from the record,¹ but it nevertheless flouts those rulings. To state the obvious: excluded testimony is not part of the record; it cannot be considered by the Commission and may not be relied upon by the parties in this case. The discussion of such testimony should not remain in NOPEC's brief disguised as "support" for its arguments. Thus, this portion of NOPEC's brief should be stricken for relying on excluded testimony.

In its March 31, 2016 Opinion and Order in this proceeding, the Commission struck portions of several intervenors' briefs on these exact grounds.² With respect to material stricken

¹ NOPEC Br., pp. 14-15.

² March 31, 2016 Opinion and Order ("March 31 Order"), p. 37.

at hearing by the Attorney Examiner, the Commission held that “parties should not rely upon evidence which has been stricken from the record.” (*Id.*) That rule applies here.

II. STRICKEN TESTIMONY MAY NOT BE RELIED UPON ON BRIEF.

On pages 15 and 16 of its brief, NOPEC cites and discusses testimony that the Attorney Examiner struck from the record, *i.e.*, certain pre-filed testimony of OCC/NOAC witness Wilson and Sierra Club witness Comings.³ The Attorney Examiners ruled that the portions of the testimony now relied upon by NOPEC were beyond the scope of rehearing.⁴ In brazen disregard of those rulings, NOPEC has chosen to rely upon the stricken testimony in its arguments before the Commission.

NOPEC apparently believes that it can cite and rely on excluded evidence as long as it labels it “proffered.”⁵ Not so. Testimony may be “proffered” only to preserve a party’s right to appeal an evidentiary ruling excluding it.⁶ A proffer does not create a backdoor opportunity for a party to rely on that information to support their arguments regarding the merits of the case.

³ NOPEC Br., pp. 15-16 (citing and discussing Wilson Rehearing Direct Testimony, p. 13 and Comings Rehearing Testimony, p. 21); Rehearing Tr. Vol. IV, pp. 780, 801-03 (collectively striking, among other things, the entirety of page 21 to Comings Rehearing Testimony); Rehearing Tr. Vol. IV, pp. 864-66, 875-76 (striking, among other things, the entirety of page 13 to Wilson Rehearing Direct Testimony).

⁴ See Rehearing Tr. Vol. IV, p. 786 (discussing Mr. Comings’ stricken testimony and noting that “his testimony is solely about the part of the [Rider RRS] calculation that hasn’t changed.”); Rehearing Tr. Vol. IV, p. 884 (discussing Mr. Wilson’s stricken testimony and stating, “[W]e are not going to spend our limited hearing time, and it wasn’t with the scope of this hearing, to relitigate all of the projections which the Commission thoroughly addressed in its Opinion and Order in this proceeding.”);

⁵ NOPEC Br., p. 15.

⁶ See *e.g.* *In the Matter of the Applications of TNT Holland Motor Express, Inc. to Amend Certificates Nos. 300-R & 407-R*, Case No. 89-582-TR-AAC, 1993 WL 13744636, at *1, Opinion and Order (Aug. 12, 1993) (“[T]he Commission observes that a proffer of evidence is meant to place a witness’ response into the record after an objection to counsel’s question has been sustained. The purpose of the proffer is to enable a reviewing court to determine whether or not the testimony should have been admitted.”); *State v. Grubb*, 28 Ohio St. 3d 199, 203, 503 N.E.2d 142, 147 (1986) (evidence must be proffered at trial to preserve any objection on the record for purposes of appeal).

As the Commission made clear in March, parties may not rely upon evidence which has been stricken from the record.⁷ NOPEC’s failure to adhere to this basic rule—and its blatant disregard for the Attorney Examiner’s rulings—requires portions of its brief to be stricken. Specifically, the Commission should grant the Companies’ motion to strike, beginning at the start of the second full paragraph on page 15 with the words “The quantitative” and continuing through the entirety of page 16 ending with the word “consumers” and footnotes 48, 49, 50, and 51.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies’ motion to strike.

⁷ March 31 Order, p. 37.

Date: August 29, 2016

Respectfully submitted,

/s/ David A. Kutik

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 29th day of August, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik
David A. Kutik

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in

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Summary: Motion Motion to Strike Portions of the Brief on Rehearing of NOPEC electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company