

**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 REPLY 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 Reply Brief on Rehearing of Northeast Ohio Public Energy Council (“NOPEC”), to wit: page 3, beginning at the start of the first full paragraph with the word “Moreover” and continuing through the entirety of the paragraph ending with the word “forecast” and footnotes 8, 9, and 10.

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: September 2, 2016

Respectfully submitted,

/s/ David A. Kutik

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

I. INTRODUCTION

NOPEC, just as it did in its initial brief on rehearing, relies on stricken testimony to argue the merits of its case before the Commission in its reply. NOPEC has decided once more to ignore the unambiguous rulings of the Attorney Examiners as well as the Commission's recent Order in this case. As discussed below—and as demonstrated in the Companies' motion to strike a portion of NOPEC's initial brief—NOPEC's reliance on excluded testimony is entirely improper.¹ The Commission should grant this Motion to Strike and enforce the Attorney Examiners' rulings.

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

On page 3 of its reply brief, NOPEC cites and discusses testimony that the Attorney Examiners struck from the record, *i.e.*, certain pre-filed testimony of OCC/NOAC witness

¹ See generally Companies' Motion to Strike Portions of the Brief on Rehearing of Northeast Ohio Public Energy Council, filed on August 29, 2016 (moving to strike portions of NOPEC's brief relying on excluded testimony).

Wilson, P3/EPISA witness Kalt, and Sierra Club witness Comings.² The Attorney Examiners ruled that this testimony was beyond the scope of rehearing and accordingly granted the Companies' motions to strike.³ NOPEC's reply brief brazenly disregards those rulings, even though NOPEC admits, as it must, that the testimony was excluded.⁴

Not only does NOPEC ignore the Attorney Examiners' rulings, it also pays no mind to the Commission's holdings *in this very proceeding*. The Commission already held in its March 31, 2016 Opinion and Order ("March 31 Order") that "parties should not rely upon evidence which has been stricken from the record."⁵ NOPEC does not bother to address the Commission's decision, presumably because it has nothing to say. The rule stated by the Commission in the March 31 Order applies equally here.

NOPEC notes that the stricken testimony was "proffered," apparently believing that a proffer permits it to cite and rely on excluded evidence.⁶ The law squarely rejects this notion. Testimony may be "proffered" only to preserve a party's right to appeal an evidentiary ruling excluding it.⁷ A proffer simply does not create an opportunity for NOPEC to rely on stricken testimony to argue the merits before the Commission.

² NOPEC Reply Br., p. 3 (citing and discussing Wilson Rehearing Direct Testimony, p. 13, Kalt Rehearing Testimony, p. 8, and Comings Rehearing Testimony, p. 3).

³ Rehearing Tr. Vol. IV, p. 801 (striking, among other things, p. 3, lines 1-4 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); Rehearing Tr. Vol. V, p. 1149 (striking, among other things, p. 7, line 17 through p. 8, line 5 to Kalt Rehearing Testimony).

⁴ NOPEC Reply Br., p. 3.

⁵ March 31 Order, p. 37.

⁶ NOPEC Reply Br., p. 3.

⁷ 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."); *Markel v. Markel*, 2004 Ohio App. LEXIS

The Commission made clear in March that parties may not rely upon evidence which has been stricken from the record.⁸ But NOPEC has now twice chosen to ignore the Commission's instructions as well as the Attorney Examiners' rulings. NOPEC's persistent disregard for such a simple rule of practice requires portions of its brief to be stricken. Specifically, the Commission should grant the Companies' Motion to Strike, beginning at the start of the first full paragraph on page 3 with the word "Moreover" and continuing through the entirety of the paragraph ending with the word "forecast" and footnotes 8, 9, and 10.

III. CONCLUSION

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

(continued...)

3073, *4 (Ohio Ct. App., Ashland County June 30, 2004) ("The purpose of a proffer is to preserve the evidence for a reviewing court."); *Bentivegna v. Sands*, 1991 Ohio App. LEXIS 3450, *7 (Ohio Ct. App., Athens County July 9, 1991) (concurring opinion) ("The purpose of a proffer is so that the appellate court will know the nature of the evidence that was to be presented.").

⁸ March 31 Order, p. 37.

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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 2nd day of September, 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

Case No(s). 14-1297-EL-SSO

Summary: Motion to Strike Portions of the Reply 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