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 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	**)**	**Case No. 14-1297-EL-SSO**

SIERRA CLUB'S MEMORANDUM CONTRA FIRSTENERGY'S MOTION TO STRIKE PORTIONS OF SIERRA CLUB'S POST-REHEARING REPLY BRIEF

In their ongoing effort to obscure the fact that customers would likely lose hundreds of millions to billions of dollars under the Modified Rider RRS proposal, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies" or "FirstEnergy") moved on September 2, 2016, to strike portions of Sierra Club's post-rehearing reply brief. In particular, the Companies claim that Sierra Club cannot cite to certain evidence that was struck by the Attorney Examiners but properly proffered at the rehearing. The Companies also move to strike portions of Sierra Club's brief that explain how rehearing evidence refutes FirstEnergy's previous arguments in support of continued reliance on mid-2014 market price forecasts. The Companies claim, incorrectly, that these arguments somehow constitute an improper surreply to prior briefing. The Commission should reject FirstEnergy's motion as meritless and, instead, consider the full array of evidence demonstrating that these mid-2014 market forecasts, which form the basis for FirstEnergy's projection of charges and credits under Modified Rider RRS, are outdated, unreliable, and wrong.

I. Sierra Club Properly Relied on Evidence that was Proffered at Hearing.

In its motion, FirstEnergy lists six portions of Sierra Club's post-rehearing reply brief that

it seeks to strike.[1] According to the Companies, the first five portions are improper because they cite to evidence that was struck by the Attorney Examiners during the rehearing.[2] In particular, in responding to FirstEnergy's claim in its initial post-rehearing brief that Modified Rider RRS would somehow provide a net benefit to customers,[3] Sierra Club noted that:

- The rehearing testimony of witnesses Comings, Kalt, and Wilson showed that, using up-to-date market forecasts, customers would lose a projected $1.3 billion to $3.6 billion under Modified Rider RRS;

- NYMEX natural gas price forwards show prices of $3.07/mmBtu in 2017 and $3/mmBtu in 2018, which is considerably lower than the price that FirstEnergy assumed for 2015 and 2016; and

- More recent capacity and natural gas price forecasts from ICF and other sources further demonstrate that the mid-2014 forecasts that FirstEnergy continues to rely on are outdated.[4]

The Companies do not dispute that such evidence was properly proffered by Sierra Club and other parties at the hearing, but contend that "a party may not cite to and rely upon proffered evidence that has otherwise been stricken from the record."[5] The Companies, however, fail to identify any support for their contention that proffered evidence cannot be cited in a reply brief. This unsupported contention must be rejected because it would improperly hinder Sierra Club's ability to challenge adverse evidentiary rulings by the Attorney Examiners, and to preserve for appeal its arguments regarding the substantive import of the proffered evidence.

In support of their motion, the Companies correctly note that the purpose of proffering

[1] Motion of FirstEnergy to Strike Portions of Sierra Club's Post-Rehearing Reply Brief ("Co. Mot.") at 1.

[2] As Sierra Club explained on pages 28 to 32 of its initial post-rehearing brief, the Commission should reverse the Attorney Examiners' granting of the Companies' motions to strike portions of the rehearing testimony of Mr. Comings, Dr. Kalt, and Mr. Wilson, and admit the complete versions of such testimony into the record.

[3] FirstEnergy Initial Rehearing Br. at 6, 8, 15, 19.

[4] *See generally* Sierra Club ("SC") Initial Rehearing Br. at 17, 23, 24.

[5] Memorandum in Support of Motion of FirstEnergy to Strike Portions of Sierra Club's Post-Rehearing Reply Brief ("Co. Mem.") at 3.

evidence that was struck by the Attorney Examiners is to preserve such evidence for appellate review.[6] Yet that is exactly what Sierra Club's discussion in its post-rehearing reply brief of the proffered evidence does. Where, as here, a party challenges an evidentiary ruling in its post-hearing briefs pursuant to O.A.C. 4901-1-15(F), the first appellate review of an attorney examiner's ruling is done by the Commission. If the Commission determines that the evidentiary ruling was in error, the Commission can then consider the proffered evidence in making its substantive ruling in the proceeding.[7] Consistent with this approach to reviewing the Attorney Examiners' evidentiary rulings, Sierra Club's discussion of the proffered evidence in its post-rehearing reply brief both demonstrates why the evidentiary rulings were in error, and preserves the substantive arguments that the Commission should consider if it reverses the exclusion of the proffered evidence.

With regards to the evidentiary rulings, Sierra Club explained in its initial post-rehearing brief that the proffered evidence should have been admitted as within the scope of the rehearing because the projections of charges and credits under Modified Rider RRS are directly relevant to the provisions of that rider and the financial impact they would have on customers.[8] In its own post-rehearing brief, FirstEnergy maintains that projections of charges and credits that rely on mid-2014 forecasts were an appropriate basis for evaluating Modified Rider RRS.[9] In replying to that claim, Sierra Club referenced the proffered evidence because it helps demonstrate that

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[6] *Id*. at 2.

[7] *See, e.g.*, *In Re Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, Entry at ¶ 7 (Apr. 25, 1990), in which the attorney examiner noted, in refusing to certify an interlocutory appeal in which the Industrial Energy Consumers ("IEC") sought to reverse the examiner's ruling excluding evidence, that "IEC can proffer its evidence for the Commission's consideration. In the event the Commission determines that the Examiner was in error, the Commission can consider the evidence proffered by IEC."

[8] SC Initial Rehearing Br. at 29-30.

[9] FirstEnergy Initial Rehearing Br. at 6, 8.

FirstEnergy's continued reliance on projections based on mid-2014 forecasts was unreasonable. Consequently, the discussion of the proffered evidence in Sierra Club's post-rehearing reply brief helps show why the evidence is relevant to the evaluation of Modified Rider RRS and should have been admitted into the record. This discussion also preserves Sierra Club's arguments regarding the substantive impact of such proffered evidence. If the Commission reverses the Attorney Examiners' rulings and considers the proffered evidence, it will be important that the Commission understand the significance of this evidence: namely, that the evidence discredits the Companies' claims regarding credits and charges under Modified Rider RRS. As such, Sierra Club's discussion of the proffered evidence in its post-rehearing reply brief is directly related to preserving such evidence for appellate review.

None of FirstEnergy's cited authorities suggest otherwise. Most of the cases cited by the Companies stand simply for the non-controversial proposition that the purpose of proffering evidence is to "preserve the evidence for a reviewing court" "so that the appellate court will know the nature of the evidence that was to be presented."[10] As explained above, the discussion of the proffered testimony in Sierra Club's post-rehearing reply brief helps achieve such purpose. The Companies' citation to *Bethesda Hosp. v. Fowler*, No. CA 77-25, 1978 WL 217626 at *10-11 (Ohio Ct. App., Muskingum County Feb. 22, 1978), in which the court reversed a lower court ruling that relied on properly excluded evidence,[11] is inapposite because here the Commission must first decide whether the proffered evidence should have been admitted into evidence. The passage in *Fowler* cited by the Companies, by contrast, came after the appellate court's determination that the proffered evidence had been properly excluded. Sierra Club has no doubt that, once the Commission resolves the evidentiary issues, the Commission will be capable of

[10] Co. Mem. at 2-3 (citations omitted).

[11] *Id.* at 2.

distinguishing between the evidence it believes can and cannot be properly relied upon. As such, the Companies' implication that the Commission might mistakenly rely on evidence it deems properly excluded rings hollow. The Companies' argument is particularly misplaced given that Sierra Club specifically identified as proffered any such evidence that it cited in its post-rehearing reply brief. In short, the Companies have provided no basis to strike the referenced portions of Sierra Club's post-rehearing reply brief.

II. Sierra Club's Post-Rehearing Reply Brief Does Not Include a "*De Facto* Sur-Reply."

The Companies' attempt to strike nearly four pages of Sierra Club's post-rehearing reply brief as a "*de facto* sur-reply" is similarly unavailing.[12] In support of their motion, the Companies claim that because this passage primarily references arguments that FirstEnergy made in its February 26 post-hearing reply brief rather than its initial post-rehearing brief, Sierra Club improperly acts "as if the hearing on rehearing had never occurred."[13]

FirstEnergy's contention is factually inaccurate and misrepresents the arguments made in the referenced portion of Sierra Club's post-hearing reply brief. Contrary to FirstEnergy's misleading portrayal, Sierra Club explained that, regardless of the merits of the Commission's March 31, 2016 decision to accept the Companies' projections and forecasts, the additional evidence in the rehearing record demonstrates that reliance on such projections and forecasts today would be wholly unreasonable.[14] In doing so, Sierra Club detailed how FirstEnergy's previous defense of these projections and forecasts had been undermined by the evidence in the rehearing record. For example, Sierra Club explained that even if the Companies' previous

[12] *See id*. at 6.

[13] *Id*. at 5-6.

[14] SC Rehearing Reply Br. at 19-24.

claim that "[b]y any measure, Mr. Rose's capacity price forecast has held up extremely well" had been reasonable at the time of the Rider RRS briefing, there is no basis upon which one could still reasonably make that claim today.[15] Similarly, while the Companies previously dismissed Sierra Club's challenges to its outdated natural gas price forecast as an artifact of low prices in December 2015, evidence in the rehearing record shows that such prices continue to be low.[16] In short, the rehearing evidence demonstrates that, regardless of the record that was before the Commission in March 2016, the Companies can no longer credibly defend their outdated capacity and natural gas price forecasts. And this is plainly relevant to the Commission's evaluation of the Modified Rider RRS proposal, for which the Companies unreasonably continue to rely on such forecasts. While the Companies may, in hindsight, wish that they had not defended their outdated forecasts, there is no reason for the Commission to ignore or exclude from the record the details of just how wrong the Companies' claims ended up being.

III. Conclusion

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

[15] *See id*. at 20-22 (quoting FirstEnergy's Feb. 26 Reply Br. at 50).

[16] *Id*. at 22-23.

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Respectfully submitted,

s/ Shannon Fisk

Richard C. Sahli (Ohio Bar #0007360)
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, Ohio 43230-3662
Telephone: (614) 428-6068
rsahli@columbus.rr.com

Shannon Fisk (PHV-1321-2016)
Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
(215) 717-4522
(212) 918-1556 (fax)
sfisk@earthjustice.org

Michael C. Soules (PHV-5615-2016)
Earthjustice
1625 Massachusetts Ave. NW, Suite 702
Washington, DC 20036
(202) 797-5237
msoules@earthjustice.org

Tony G. Mendoza (PHV-5610-2016)
Sierra Club
Environmental Law Program
85 Second Street, Second Floor
San Francisco, CA 94105-3459
(415) 977-5589
tony.mendoza@sierraclub.org

Attorneys for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been served upon the following parties via electronic mail on September 19, 2016:

s/ Michael Soules
Michael Soules

PERSONS SERVED

Thomas.mcnamee@puc.state.oh.us
Thomas.lindgren@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
joseph.clark@directenergy.com
zkravitz@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
Kevin.moore@occ.ohio.gov
sauer@occ.state.oh.us
leslie.kovacik@toledo.oh.gov
jscheaf@mcdonaldhopkins.com
marilyn@wflawfirm.com
gkrassen@bricker.com
dborchers@bricker.com
mfleisher@elpc.org
selisar@mwncmh.com
Amy.Spiller@duke-energy.com
jeffrey.mayes@monitoringanalytics.com
laurac@chappelleconsulting.net
mjsettineri@vorys.com
sechler@CarpenterLipps.com
cynthia.brady@constellation.com
lael.campbell@exeloncorp.com
tony.mendoza@sierraclub.org
cdunn@firstenergycorp.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
TODonnell@dickinsonwright.com
dstinson@bricker.com
drinebolt@ohiopartners.org
Ccunningham@Akronohio.Gov
Jeanne.Kingery@dukeenergy.com
toddm@wamenergylaw.com
gthomas@gtpowergroup.com
stheodore@epsa.org
glpetrucci@vorys.com
gpoulos@enernoc.com
david.fein@constellation.com
asonderman@keglerbrown.com
msoules@earthjustice.org
mdortch@kravitzllc.com
rparsons@kravitzllc.com
ghiloni@carpenterlipps.com
callwein@keglerbrown.com
Ajay.kumar@occ.ohio.gov
larry.sauer@occ.ohio.gov
maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
mkl@smxblaw.com

jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
gas@smxblaw.com
rkelter@elpc.org
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
mwarnock@bricker.com
kfield@elpc.org

Attorney Examiners:
Gregory.Price@puc.state.oh.us
Mandy.Chiles@puc.state.oh.us
Megan.Addison@puc.state.oh.us

Summary: Memorandum Sierra Club's Memorandum Contra FirstEnergy's Motion to Strike Portions of Sierra Club's Post-Rehearing Reply Brief electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club