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

REPLY OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY IN SUPPORT OF MOTIONS TO STRIKE PORTIONS OF THE BRIEFS ON REHEARING OF NORTHEAST OHIO PUBLIC ENERGY COUNCIL

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") have moved to strike material contained in the Post-Rehearing Initial and Reply Briefs of the Northeast Ohio Public Energy Council ("NOPEC") that the Attorney Examiners excluded from the record in this proceeding.[1] Specifically, the material targeted by the Companies' Motions to Strike was excluded from the record in a series of evidentiary rulings by the Attorney Examiners during the hearing on rehearing. Under the misunderstood guise of an evidentiary proffer, NOPEC substantively relies on this stricken

[1] *See* 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 (Aug. 29, 2016) and 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 (Sept. 2, 2016) (collectively, the "Companies' Motions to Strike").

material in its post-rehearing briefing. Doing so runs counter to settled Ohio and Commission precedent.

In its Memorandum Contra the Companies' Motions to Strike, for the *third* time NOPEC trots out the same excluded evidence that the Companies have sought to strike in their two motions. *See* Memo Contra, pp. 3-4. NOPEC apparently believes that contesting an evidentiary ruling on brief pursuant to Rule 4901-1-15(F) transforms merely proffered evidence into *bona fide* evidence of record. As such, NOPEC in essence claims that any party to this proceeding may rely on this proffered evidence to make substantive arguments on brief – *simply because it has been proffered*. *See id.* Indeed, NOPEC goes so far as to suggest that the Commission should, apparently *sua sponte*, insert such merely proffered evidence into the record when "crafting its orders." *See* Memo Contra, pp. 1, 3. To do otherwise, NOPEC claims, "would set a dangerous precedent" by somehow precluding the Commission from reviewing the propriety of an Attorney Examiner's evidentiary ruling. Memo Contra, p. 1. These bizarre claims and unsupported conclusions fly in the face of settled Ohio precedent regarding the evidentiary proffering process discussed below. Because NOPEC fails to grasp the nature and procedural limits of an evidentiary proffer under Ohio law and further misconstrues Rule 4901-1-15(F), O.A.C, the Commission should grant the Companies' Motions to Strike.

II. LAW AND ARGUMENT

A. Under Ohio Law And Commission Precedent, Evidentiary Proffers Merely Preserve A Party's Right To Appeal An Adverse Evidentiary Ruling.

Rule 103 of the Ohio Rules of Evidence codifies the use of evidentiary proffers at trial or hearing. As Ohio courts have observed, Rule 103 itself is based upon the common law doctrine that a proffer of otherwise excluded evidence is necessary in order to preserve any alleged prejudicial error for appellate review:

> [W]e consider the requirement of a proffer set forth in Evid. R. 103 to be a codification, in the context of evidentiary rulings, of the common law principle that an appellant must demonstrate that any error occurring during the course of trial was sufficiently prejudicial to merit reversal. Even in the absence of Evid. R. 103, therefore, a party aggrieved by a ruling excluding evidence must preserve the error by making of record the prejudicial effect of the ruling, at least where the prejudicial effect of the ruling is not already apparent from the record.

State v. Picklesimer, 2007 Ohio App. LEXIS 5062, *15 (Ohio Ct. App., Greene County Oct. 26, 2007) *See also, Markel v. Markel*, 2004 Ohio App. LEXIS 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.").

This rule makes sense. For a reviewing court (or, in this case, the Commission) to determine whether a particular evidentiary ruling excluding evidence was proper, the excluded evidence must be available for review. A proffer makes such evidence available for review.[2]

NOPEC misunderstands the purpose of a proffer. NOPEC posits that it must be allowed to comment substantively on the excluded evidence in case the Commission overturns the rulings excluding that evidence. This is wrong. If evidence is determined to have been improperly excluded, the proper remedy is <u>not</u> for a reviewing court (or the Commission) to *sua sponte*

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[2] Indeed, if a party, subsequent to an adverse evidentiary ruling, fails to make the requisite proffer of the evidence so excluded, then that party waives the right to contest the evidentiary ruling on appeal. "Absent a proffer, a reviewing court has no way of determining if the excluded evidence prejudiced the appellant….Accordingly, if no proffer is made, the party seeking to introduce the evidence in question waives the error on appeal." *Bloomfield v. Fox*, 2006 Ohio App. LEXIS 5472, *8 (Ohio Ct. App., Hancock County Oct. 23, 2006) (collecting cases). S*ee also, City of Cleveland Heights v. Crum*, 1978 Ohio App. LEXIS 10158, *6-7, (Ohio Ct. App., Cuyahoga County Aug. 10, 1978) ("Because appellant did not proffer the evidence excluded, he fails to demonstrate the prejudicial effect of its exclusion and the error, if any, must be presumed harmless."); *State v. Grubb*, 28 Ohio St. 3d 199, 203 (1986) (holding that evidence must be proffered at trial to preserve any objection on the record for purposes of appeal).

insert such evidence into the record and then render a decision based upon evidence that was merely proffered but never admitted. *See, e.g., Bethesda Hosp. v. Fowler*, 1978 Ohio App. LEXIS 8732, *26-27 (Ohio Ct. App., Muskingum County Feb. 22, 1978) (reversing and remanding Court of Common Pleas decision which vacated an order from the Board of Review, Ohio Bureau of Employment Services because the lower court failed to make a determination "based solely upon the evidence of record" and instead improperly relied upon "evidence proffered but properly excluded" from consideration).[3]

Instead, the proper remedy for proffered but improperly excluded and material[4] evidence would be to remand the matter to the trial or hearing forum for a new hearing that may incorporate the disputed evidence. *See, e.g., In re Estate of Haynes*, 25 Ohio St. 3d 101, 104-105 (1986) (holding, in the context of a probate proceeding, "the rejection of the proffered testimony was prejudicial error and requires a rehearing on the issue of revocation. Accordingly…we affirm the court of appeals' judgment reversing the probate court and remand this cause to that court for further proceedings consistent with this decision."); *Bacsa v. Mayo's Pub Bar*, 1998 Ohio App. LEXIS 599, *6-7 (Ohio Ct. App., Cuyahoga County Feb. 19, 1998)

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[3] Indeed, at any level, under Ohio law a tribunal's reliance upon merely proffered but never admitted evidence constitutes reversible error. *See, e.g., Fishback v. Fishback*, 22 Ohio App. 2d 79, 82 (Ohio Ct. App. 1969) ("There is nothing in the transcript of the testimony to show that the proffered testimony of the witness….was admitted in evidence by the court. The proffered testimony was not before the court when it made its finding of fact and conclusions of law, and it was prejudicial error for the court to consider it in arriving at its judgment.").

[4] Under Ohio law, improperly excluded but *immaterial* evidence counts as harmless error and no relief is warranted. *See, e.g., Grubbs v. Administrator, Bureau of Workers' Compensation*, 1998 Ohio App. LEXIS 1929, *8-9, (Ohio Ct. App., Ashland County Apr. 9, 1998) (holding that, while "the trial court improperly excluded [an expert's] testimony," any resulting error was "harmless…because the information sought to be introduced by appellant did not go to" any of the issues at bar and therefore no remand was necessary).

(remanding "cause for a new trial on the issue of damages" after finding that the lower court's "exclusion" of "the appellant's proffered medical bills" was "prejudicial").

Thus, settled Ohio precedent contemplates a four-step process regarding the proper use of evidentiary proffers. First, a lower court renders a ruling that excludes certain evidence which a party seeks to introduce into the evidentiary record. Second, the party subject to that adverse evidentiary ruling makes a proffer of that evidence on the record in order to preserve the issue for appeal. Third, a reviewing court considers the propriety of the disputed evidentiary ruling. Fourth, should the reviewing court determine that the lower court's ruling was in error, the reviewing court remands the matter to the lower court for a new hearing that incorporates the previously excluded evidence. Such a result protects the due process rights of the complaining party by allowing the introduction of the previously excluded evidence into the record. Notably, such a process also protects the due process rights of the party that originally was successful in excluding such evidence by, e.g., affording that party the right to cross-examine the witness(es) sponsoring the newly introduced evidence, permitting that party to put on rebuttal witnesses to challenge the newly introduced evidence, etc.

The Commission's precedent and Rules are on all fours with the settled Ohio precedent above. Regarding the purpose of an evidentiary proffer: "[T]he Commission observes that a proffer of evidence is meant to place a witness's 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." *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, *1, Opinion and Order (Aug. 12, 1993).

Rule 4901-1-15, O.A.C., also proves instructive. Regarding contesting an adverse ruling by an Attorney Examiner on brief, as opposed to through an interlocutory appeal, Rule 4901-1-15 provides, in pertinent part:

> (F) Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner *may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief* or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

Rule 4901-1-15(F), O.A.C. (emphasis added). *See also, In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Case No. 06-685-AU-ORD*, 2006 Ohio PUC LEXIS 746, *43 (Dec. 6, 2006) ("The Commission agrees with staff's position that a party that is adversely affected by an attorney examiner's ruling but elects not to take an interlocutory appeal from the ruling may still raise the propriety of the attorney examiner's ruling by discussing the matter in its initial brief or other appropriate filing prior to the issuance of the Commission's decision.")

Clearly, Rule 4901-1-15(F) is not intended as a license for a party aggrieved by an allegedly adverse evidentiary ruling to use proffered but otherwise excluded evidence to make substantive arguments on brief. Nor does it entail that the Commission may *sua sponte* incorporate proffered evidence into any substantive decision that the Commission subsequently renders. Rather, Rule 4901-1-15(F) permits a party to raise the allegedly adverse evidentiary ruling it seeks to challenge as a "distinct issue in its initial brief" for "Commission consideration," i.e., for a determination of the "propriety of the ruling" at issue.

B. NOPEC Fails To Understand The Nature And Proper Use Of Evidentiary Proffers And Thereby Misconstrues Rule 4901-1-15(F).

As noted, NOPEC's briefs attempt to argue the merits of its position based on excluded evidence. In its Memorandum Contra, NOPEC asserts that proffered evidence is fair game for comment because the Commission can consider such evidence. *See* Memo Contra, pp. 2-3. To the contrary, Rule 4901-1-15(F) is not a mechanism for magically transforming proffered evidence into admitted evidence that may then be relied upon to make substantive arguments on brief. Instead, the Rule merely enables a party to contest an Attorney Examiner's ruling excluding that proffered evidence "as a distinct issue" for review. *See, e.g.*, *In re TNT Hollander* at *1; Rule 4901-1-15(F). Contrary to NOPEC's wayward claims about the "Commission's different administrative decision-making process" (Memo Contra, p. 2), this outcome is entirely consistent with the Ohio case law cited above. *See, e.g.*, *Picklesimer* at *15; *Markel* at *4; *Bentivegna* at *7. Indeed, NOPEC admits as much when its states that the Commission "essentially takes the place of an appellate court in initially reviewing" contested evidentiary rulings by an Attorney Examiner. Memo Contra, p. 2.

At the hearing on rehearing, the Attorney Examiners granted in part the Companies' motions to strike portions of the rehearing testimony of Sierra Club witness Comings, OCC/NOAC witness Wilson, and P3/EPSA witness Kalt. *See* Rehearing Tr. Vol. IV, 780:9-11, 801:1-803:7 (Mr. Comings); 862:2-9, 864:18-866:10, 875:12-21, 882:7-10 (Mr. Wilson); Rehearing Tr. Vol. V, 1127:10-20; 1149:13-1151:24 (Dr. Kalt). Specifically, the Attorney

Examiners excluded such evidence from the record because it was cumulative and beyond the scope of the hearing on rehearing.[5]

NOPEC argues that its discussion of the excluded evidence was in the context of properly contesting the rulings excluding the evidence. *See* Memo Contra, p. 4. Far from it. In its initial post-rehearing brief, after mentioning the Attorney Examiners' evidentiary rulings, all NOPEC said was: "The Commission should overrule the Attorney Examiner's ruling striking the testimony, and consider the intervening witnesses' proffered testimony" in making its decision. NOPEC's Initial Post-Rehearing Brief, p. 14. NOPEC then proceeded to launch into a three-page substantive argument relying exclusively on excluded evidence from the rehearing testimonies of Messrs. Wilson and Comings, and Dr. Kalt, that had been proffered but never admitted into the record. *See id.* pp. 15-17; *see also*, NOPEC Post-Rehearing Reply Brief, p 3. Not only is this procedurally improper maneuver undercut by the Ohio and Commission precedent cited above, it deliberately flouts the Commission's edict in its Opinion and Order, dated March 31, 2016 ("March 31 Order"), that "parties should not rely upon evidence which has been stricken from the record." March 31 Order, p. 37.[6]

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[5] The Companies demonstrated the propriety of these rulings in their Post-Rehearing Reply Brief. *See* Companies' Post-Rehearing Reply Brief, pp. 164-189 (Aug. 29, 2016).

[6] The proper course for NOPEC would have been to have done what Sierra Club, OCC/NOAC and P3/EPSA did in their initial post-rehearing briefs. Following their proffers of the excluded evidence at hearing, these intervenors contested the Attorney Examiners' evidentiary rulings as distinct issues in their respective initial post-rehearing briefs. In doing so, these intervenors discussed the evidence at issue but did not rely on that evidence, as NOPEC has, to make substantive arguments . *See* Rehearing Tr. Vol. IV, p. 805 (Sierra Club proffer of the stricken portions of Mr. Comings' testimony); Rehearing Tr. Vol. IV, p. 876 (OCC/NOAC proffer of the stricken portions of Mr. Wilson's testimony); Rehearing Tr. Vol. V, pp. 1133, 1156 (P3/EPSA proffer of the stricken portions of Dr. Kalt's testimony); OCC/NOAC Initial Post-Rehearing Brief, pp. 58-68 (contesting Attorney Examiners' evidentiary rulings without relying on excluded material to make substantive arguments); Sierra Club Initial Post-Rehearing Brief , pp. 28-31 (same); P3/EPSA Initial Post-Rehearing Brief, pp. 66-68 (same); OMAEG Initial Post-Rehearing Brief, pp. 10-16 (same). Given that, unlike NOPEC, these intervenors did not rely on excluded testimony to make substantive arguments in their initial briefs but instead merely sought to challenge the Attorney Examiners' rulings,

NOPEC compounds this error when it makes the unabashed claim that the Commission would be setting "dangerous precedent" by granting the Companies' Motions to Strike. Memo Contra, p. 1. Specifically, NOPEC alleges that granting the Companies' Motions to Strike would somehow limit the Commission's ability to review the propriety of evidentiary rulings contested on brief. *See id*. NOPEC has it exactly backwards. *What would set a dangerous precedent* would be for the Commission to accept NOPEC's wayward understanding of evidentiary proffers. If NOPEC was correct, evidentiary proffers would function as a means for a party to have otherwise excluded evidence inserted into the record on brief pursuant to Rule 4901-1-15(F) as long as the Commission found an evidentiary ruling to be improper.

Adopting such a rule would prove highly prejudicial to the party that was originally successful in excluding the evidence at issue. It would deprive that party of its ability to cross-examine the witness(es) who sponsored such testimony or to offer rebuttal testimony in response. As noted, the proper remedy when material evidence is held to have been improperly excluded is to remand the matter for additional proceedings in accordance with the revised or reversed evidentiary ruling. *See, e.g., In re Estate of Haynes* at 104-105; *Bacsa* at *6-7. This result ensures that the due process rights of all parties – whether those who prevailed originally in

(continued…)

the Companies did not move to strike those portions of these intervenors' briefs. Notably, however, Sierra Club followed in NOPEC's footsteps in its post-rehearing reply brief when Sierra Club too began citing to, and relying upon, portions of intervenor rehearing testimony excluded from the record by the Attorney Examiners. *See* Sierra Club Post-Rehearing Reply Brief, pp. 17, 20-24. The Companies subsequently moved to strike the offending portions of Sierra Club's post-rehearing reply brief. *See* the Companies' Motion to Strike Portions of Sierra Club's Post-Rehearing Reply Brief (Sept. 2, 2016).

excluding evidence or those who prevailed in having an Attorney Examiner's ruling excluding evidence reversed subsequent to Commission review – are protected.

The Commission authority upon which NOPEC ostensibly seeks to rely is misplaced. In *In re Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 436 (April 25, 1990), the Attorney Examiner refused to certify an interlocutory appeal by an intervenor concerning evidence that the Attorney Examiner had excluded from the record as irrelevant. *See id.* at *9-10. In doing so, the Attorney Examiner observed that the aggrieved party could make a proffer of the excluded material to the Commission and, if the Commission were to find that the Attorney Examiner "was in error, the Commission can consider the evidence proffered" by the intervenor. *Id.* at *10.

NOPEC misreads this decision as permitting the wholesale importation by the Commission of any excluded evidence into the record once an evidentiary ruling excluding such evidence is reversed. *See* Memo Contra, p. 3. Rule 4901-1-15(F) and Commission precedent do not contemplate such a prejudicial result. Again, "The purpose of the proffer is to enable a reviewing court to determine whether or not the testimony should have been admitted." *In re TNT Holland* at *1. To allow merely proffered but otherwise excluded evidence to factor substantively into a Commission decision would deprive the party that originally was successful in excluding such evidence of the right to cross-examination and the opportunity to rebut such newly admitted evidence through testimony or redirect examination. Thus, NOPEC's misplaced reliance on *In re Ohio Edison* falls flat.[7]

[7] In its Memorandum Contra, NOPEC cites to one other case, *State v. Gilmore*, 28 Ohio St. 3d 190 (1986). *See* Memo Contra, p. 2. *Gilmore* simply establishes that a formal evidentiary proffer under Rule 103 is not necessary if the content of the evidence otherwise excluded is apparent from a trial court record. *See id.*, 192, 193.

III. CONCLUSION

For the reasons stated above, and in the Companies' Motions to Strike, the Commission should strike the material contained in NOPEC's Post-Rehearing Initial and Reply Briefs that cites to and relies upon evidence excluded from the record in this proceeding.

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Respectfully submitted,

/s/ David A. Kutik

Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216)579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I certify that the above was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 19th 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
One of the Attorneys for the Companies

Summary: Reply in Support of Motions to Strike Portions of the Briefs 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