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 MOTION TO STRIKE PORTIONS OF SIERRA CLUB'S POST-HEARING REPLY BRIEF ON REHEARING

I. INTRODUCTION

In its post-rehearing reply brief, Sierra Club repeatedly cited to and substantively relied upon evidence that the Attorney Examiners excluded from the record at the hearing on rehearing. In addition, in its post-rehearing reply brief, Sierra Club engaged in an impermissible, *de facto* sur-reply to the Companies' original post-hearing reply brief filed in this proceeding on February 26, 2016. For these reasons, Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively, the "Companies") moved to strike portions of Sierra Club's post-hearing reply brief (the "Companies' Motion to Strike"). Sierra Club's Memorandum Contra provides neither a justification nor an excuse for the improper material in Sierra Club's brief. Indeed, adopting the rule suggested by Sierra Club – that would allow a party to cite to inadmissible testimony merely because it was proffered – is patently wrong and prejudicial. It would, at once, do away with any need for the rules of evidence and require parties to present responses to all evidence, regardless of whether that evidence was

admitted at all. Accordingly, for the reasons that follow, and as demonstrated in the Companies' Motion to Strike, the Commission should strike these portions of Sierra Club's post-rehearing reply brief.

II. ARGUMENT

A. Sierra Club Misunderstands The Law Of Evidentiary Proffers And Misconstrues Rule 4901-1-15(F).

1. Under Ohio law and Commission precedent, evidentiary proffers merely preserve a party's right to appeal an adverse evidentiary ruling.

As Sierra Club acknowledges (*see* Memo Contra, pp. 2-3), under Ohio law, the purpose of an evidentiary proffer of otherwise excluded evidence is to preserve any alleged prejudicial error for appellate review. *See, e.g.*, *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."). Through preserving otherwise excluded evidence for review, a proffer enables a reviewing court (in this case the Commission) to determine the propriety of the ruling that excluded the evidence at issue.[1]

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[1] Under Ohio law, the failure to make a proffer waives the issue for consideration 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.").

Yet, Sierra Club also apparently believes that, under Ohio law, the remedy for improperly excluded but proffered evidence would be for the reviewing court (here the Commission) to insert such evidence into the record *sua sponte* and then issue an opinion relying upon such evidence. *See* Memo Contra, pp. 3, 4. This is mistaken. As Ohio law makes clear, the proper remedy for proffered but improperly excluded and material[2] 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) (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 issues a ruling excluding certain evidence that 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

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[2] 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).

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 was successful in excluding such evidence by, e.g., affording that party the right to cross-examine or respond to the witness(es) sponsoring the disputed evidence, permitting that party to put on rebuttal witnesses to challenge such evidence, etc.

Bethesda Hosp. v. Fowler, 1978 Ohio App. LEXIS 8732, *26-27 (Ohio Ct. App., Muskingum County Feb. 22, 1978), which Sierra Club entirely misreads, neatly encapsulates the proffering process outlined above. In *Fowler*, the appellate court reversed and remanded a lower court order that relied upon proffered but never admitted evidence to vacate a decision from the Board of Review, Ohio Bureau of Employment Services. *See id.* at *26-27. A hospital employee was discharged from employment and his former employer, a hospital, sought to challenge his eligibility for unemployment compensation. *See id.* at *1. At the Board hearing, the hospital sought to introduce evidence that its former employee had been convicted of theft. *See id.* at *17. The Board ruled that the evidence was irrelevant but allowed it to be proffered into the record. *See id.* at *18 The Board, without ever admitting the proffered evidence, found that the former employee was entitled to unemployment compensation. *See id.* at *19. The hospital appealed the Board's ruling to the Court of Common Pleas. *See id.*

The Court of Common Pleas found that the Board had improperly excluded the evidence of theft and vacated the Board's decision. *Id.* at *23. Notably, no remand occurred. Instead, the

Court of Common Pleas simply relied upon the proffered evidence and entered judgment in favor of the hospital. *Id.* The former employee subsequently appealed, claiming that it was prejudicial error for the Court of Common Pleas to rely on such evidence in its decision. *Id.*

The Court of Appeals reversed and remanded decision of the Court of Common Pleas. As a preliminary matter, the Court of Appeals expressed surprise that the Court of Common Pleas had held that the disputed evidence had been "improperly excluded," yet had failed to order "a remand to the Board for reconsideration" and ignored "the right of the employee [i.e., the party that had originally succeeded in having the evidence excluded] to have reconsideration by the Board of Review." *Id.* at *24. In turn, the Court of Appeals held that the Board, acting within its discretion, had in fact properly excluded the evidence at issue. *See id.* at *26 Therefore, the Court of Common Pleas was doubly in error. *See id.* at *24-27. On remand, the Court of Appeals instructed the Court of Common Pleas to ignore "the evidence proffered but properly excluded" and base its decision on remand "solely upon the evidence of record." *Id*. at *27.[3]

Relevant Commission precedent is to the same effect as the settled Ohio case law discussed above. Like Ohio courts, the Commission views evidentiary proffers as a means to preserve for appeal alleged prejudicial errors contained in disputed evidentiary rulings. *See, e.g*., *In the Matter of the Applications of TNT Holland Motor Express, Inc. to Amend Certificates Nos.*

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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.").

300-R & 407-R., Case No. 89-582-TR-AAC, 1993 WL 13744636, *1, Opinion and Order (Aug. 12, 1993) ("The purpose of the proffer is to enable a reviewing court to determine whether or not [otherwise excluded] testimony should have been admitted.").

Rule 4901-1-15, O.A.C., properly construed, proves instructive here as well. Regarding challenging 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.")

Rule 4901-1-15(F) does not provide a mechanism for a party to use proffered but otherwise excluded evidence to make substantive arguments at any stage of briefing – whether initially or on reply. Rather, Rule 4901-1-15(F) permits a party to raise the allegedly adverse evidentiary ruling as a "distinct issue in its initial brief" for "Commission consideration," i.e., for a determination of the "propriety of the ruling" at issue. The Rule also does not contemplate the Commission *sua sponte* incorporating proffered but never admitted evidence into any of its

decisions subsequent to a review of the propriety of an evidentiary ruling by an Attorney Examiner.

2. There is no legal basis for Sierra Club to make substantive arguments on reply which rely on merely proffered but never admitted evidence.

At the hearing on rehearing, the Attorney Examiners struck certain portions of the rehearing testimonies of Sierra Club witness Comings, OCC witness Wilson, and P3/EPSA witness Kalt as cumulative and beyond the scope of the hearing on rehearing. *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). Sierra Club took exception to the Attorney Examiners' ruling regarding Mr. Comings' rehearing testimony and proffered this testimony into the record. *See* Rehearing Tr. Vol. IV, p. 805. Consistent with Rule 4901-1-15(F), in its initial brief on rehearing, Sierra Club proceeded to challenge these evidentiary rulings as a "distinct issue." *See* Sierra Club Initial Post-Hearing Brief on Rehearing, pp. 28-32 (Aug. 15, 2016). Notably, in its initial rehearing brief, Sierra Club did not cite to or substantively rely upon the excluded evidence at issue. *See generally id.* As such, the Companies did not move to strike this material from Sierra Club's initial rehearing brief.

In its Post-Rehearing Reply Brief on Rehearing, however, Sierra Club repeatedly cites to intervenor rehearing testimony stricken from the record. *See* Companies' Motion to Strike, pp. 3-5. Based upon its misunderstanding of the evidentiary proffer process, and its subsequent misconstruing of Rule 4901-1-15(F), Sierra Club contends that it may rely upon proffered but otherwise excluded evidence to make substantive arguments on reply. *See* Memo Contra, pp. 2-4. Sierra Club now mistakenly asserts that "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." Memo Contra, p. 3.

As the authorities discussed above show, this is simply not true. What's more, such a rule as suggested by Sierra Club would unfairly prejudice the Companies, and, indeed, any party to a Commission proceeding, that was successful in having certain evidence excluded from the record. On Sierra Club's (mis)understanding of evidentiary proffers, parties initially successful at having certain evidence excluded apparently would forfeit their right to cross-examination and opportunity for rebuttal should subsequent reversal on appeal occur. To avoid this untoward outcome, as noted, the proper remedy for proffered but otherwise improperly excluded and material evidence is remand for rehearing to allow the parties to offer and respond to the disputed evidence. *See, e.g., In re Estate of Haynes* at 104-105; *Bacsa* at *6-7. Only this result ensures that the due process rights of each party – whether the party that initially prevailed or that party that prevailed on appeal – receive proper protection.

Sierra Club's reliance on *In re Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, Entry, 1990 Ohio PUC LEXIS 436 (April 25, 1990), the sole authority cited in its Memorandum Contra, is misplaced. In that case, 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.

Sierra Club misinterprets this Attorney Examiner Entry denying a request for certification of an interlocutory appeal as somehow allowing the Commission to import, without restriction,

any excluded evidence into the record once an evidentiary ruling excluding such evidence is reversed. *See* Memo Contra, p. 3. Clearly, Rule 4901-1-15(F), Commission precedent, and settled Ohio law do not contemplate such a prejudicial result.

Accordingly, the Commission should grant the Companies' motion to strike those portions of Sierra Club's post-rehearing reply brief that cite to, and rely upon, evidence excluded from the record by the Attorney Examiners at the hearing on rehearing.

B. The *De Facto* Sur-Reply Contained In Sierra Club's Post-Rehearing Reply Brief Is Procedurally Improper.

In its post-rehearing reply brief, filed on August 29, 2016, Sierra Club attempts to provide a procedurally improper *de facto* sur-reply to the Companies' original post-hearing reply brief filed in this proceeding on February 26, 2016. As shown in the Companies' Motion to Strike, over the span of three pages in its post-rehearing reply brief, Sierra Club cites to the Companies' original reply brief in no less than nine separate footnotes. *See* Companies' Motion to Strike, pp. 5-6. When doing so, Sierra Club repeatedly attempts to respond to arguments that the Companies made some eight months ago and which the Commission already has ruled upon in its March 31 Order. *See id.* In its Memorandum Contra, Sierra Club fails to provides a viable justification or an excuse for its procedurally improper briefing behavior. *See* Memo Contra, pp. 5-6. Instead, Sierra Club once again improperly resorts to quoting from the Companies' original reply brief and attacking the Companies' arguments contained therein. *See id.*

Sierra Club hardly attempts to defend its improper actions. In fact, it effectively "doubles down" by demonstrating that it is doing exactly what the Companies said it had done – re-litigating the Commission's prior determination that the Companies' forecasts were reasonable. For example, Sierra Club states, "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." Memo Contra, p. 5. Sierra Club also points to another argument that it attempts to rebut -- that Company witness Rose's forecasts "had held up well"— by citing (again) to the Companies' February 26, 2016 reply brief. *Id.,* p. 6, n. 15.

Sierra Club ignores the fact that the Commission's Rules do not contemplate sur-replies (and, even if they did, those Rules would never countenance a sur-reply filed several months after the fact). Further, Sierra Club cites to no authority to support this untoward briefing behavior – precisely because there is none. In addition, Sierra Club makes no attempt to distinguish the Commission authority cited in the Companies' Motion to Strike that disallowed improper sur-replies – precisely because Sierra Club cannot do so. Settled Commission precedent demonstrates that unauthorized, *de facto* sur-replies have no place in Commission proceedings. *See, e.g.*, *In the Matter of the Complaint of the City of Reynoldsburg, Ohio*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, *58-59 (April 05, 2011) (striking portions of memorandum in support of motion ostensibly to correct citations subsequent to filing of reply briefs because this material constituted an "impermissible surreply"). *See also*, *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011*, Case No. 11-5843-GA-RDR, 2012 Ohio PUC LEXIS 801 at *7-11 (Oct. 3, 2012) (denying motion for leave to file sur-reply).

As such, the Commission should grant the Companies' motion to strike those portions of Sierra Club's post-rehearing reply brief that constitute an impermissible, *de facto* sur-reply.

III. CONCLUSION

For the reasons stated above, and in the Companies' Motion to Strike, the Commission should strike the material contained in Sierra Club's Post-Hearing Reply Brief on Rehearing that cites to and relies upon evidence excluded from the record in this proceeding and that constitutes an impermissible, *de facto* sur-reply.

Date: September 23, 2016

Respectfully submitted,

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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 23rd 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 Motion to Strike Portions of Sierra Club's Post-Hearing Reply Brief on Rehearing electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company