

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Company, and The Toledo Edison Company)	Case No. 14-1297-EL-SSO
for Authority to Provide for a Standard Service)	
Offer Pursuant to R.C. 4928.143 in the Form of)	
An Electric Security Plan)	

**SIERRA CLUB’S MOTION TO STRIKE PORTIONS OF THE SUPPLEMENTAL
TESTIMONY OF STEPHEN J. BARON
AND REQUEST FOR EXPEDITED RULING**

Pursuant to O.A.C. § 4901-1-12, Sierra Club respectfully moves for an order striking the following portions of Stephen J. Baron’s Supplemental Testimony, filed in this proceeding on March 2, 2015, by the Ohio Energy Group (“OEG”):

- page 3, lines 3-5 (from “1)” through “FirstEnergy”);
- page 3, line 20 through page 4, line 4; and
- page 5, line 17 through page 9, line 2.

This testimony should be stricken because it is not “testimony regarding the stipulation filed on December 22, 2014.”¹ Instead, in violation of the procedural schedule established for this proceeding, Mr. Baron offers opinions on aspects of the Companies’ proposed electric security plan that are unchanged by the stipulation. Mr. Baron’s out-of-time testimony should be stricken.

¹ Attorney Examiner Entry, Feb. 4, 2015, ¶ 5; *id.* ¶ 8(c) (adjusting deadline to Mar. 2, 2015).

For these reasons, and for the reasons set forth in the accompanying Memorandum, Sierra Club respectfully requests that the Commission address this motion under its expedited procedures and that this motion to strike portions of Mr. Baron's testimony be granted.

March 20, 2015

Respectfully submitted,

/s/ Christopher J. Allwein

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**MEMORANDUM IN SUPPORT OF
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TESTIMONY OF STEPHEN J. BARON
AND REQUEST FOR EXPEDITED RULING**

Pursuant to O.A.C. § 4901-1-12, Sierra Club respectfully moves to strike the following portions of Stephen J. Baron’s Supplemental Testimony, filed in this proceeding on March 2, 2015, by the Ohio Energy Group (“OEG”):

- page 3, lines 3-5 (from “1”) through “FirstEnergy”);
- page 3, line 20 through page 4, line 4; and
- page 5, line 17 through page 9, line 2.

As explained below, these portions of testimony should be stricken because they do not constitute “testimony regarding the stipulation filed on December 22, 2014,”² and because the submission of this testimony violates the procedural schedule for this case.

I. Background

In this proceeding, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) seek approval of an electric security plan, which includes a proposed Retail Rate Stability Rider (“Rider

² Attorney Examiner Entry, Feb. 4, 2015, ¶ 5; *id.* ¶ 8(c) (adjusting deadline to Mar. 2, 2015).

RRS”). If approved, Rider RRS would require the Companies’ customers to bear the risks of ownership of four generating facilities owned wholly or partly by the Companies’ deregulated corporate affiliate FirstEnergy Solutions Corp (“FES”). In particular, customers would be required to pay all of the capital, fixed, and variable costs of FES’s share of the four generating facilities, but would not receive any of the energy from those facilities. Instead, the energy would be sold into the PJM market, and customers would receive either a credit (if revenues from sales exceed costs) or a charge (if costs exceed revenues). The Companies’ own projections forecast that customers would incur a net loss of \$404 million in the first three years if the proposal were approved.³ The proposed rider is a component of what the Companies refer to as their “Economic Stability Program.”⁴

Under the procedural schedule established for this proceeding, intervenor testimony was due on December 22, 2014.⁵ Numerous intervenors, including Sierra Club, timely filed testimony regarding the policy implications of and risks associated with Rider RRS. OEG, which had moved to intervene on August 5, 2014, did not file testimony on Rider RRS or any other aspect of the proposed electric security plan.

Although intervenor testimony was due on December 22, 2014, the Attorney Examiners subsequently allowed the parties to file supplemental testimony on a targeted set of issues. This decision was prompted by the Companies’ filing of a stipulation on

³ See Direct Testimony of Jay A. Ruberto, Attachment JAR-1 Revised, Nov. 14, 2014 (projecting a cost to ratepayers of \$155 million in 2016, \$167 million in 2017, and \$82 million in 2018).

⁴ Application, Aug. 4, 2014, at 9

⁵ See Attorney Examiner Entry, Oct. 6, 2014, ¶¶ 8, 8(b).

December 22, the same day that intervenor testimony was due. By its terms, the stipulation affected Rider RRS in just one minor respect: the stipulation modified how the charge or credit associated with Rider RRS will be calculated—basing it on billing demand—for several classes of the Companies’ customers.⁶

The Attorney Examiners held a prehearing conference on December 30, 2014. At the conference, “many parties expressed concerns that, given the filing of the stipulation, the [then] existing procedural schedule would not allow sufficient time for discovery on the new information [and] preparation of supplemental testimony.”⁷ In response, the Attorney Examiners revised the procedural schedule to allow the parties to conduct discovery and submit testimony related to the stipulation:

[I]n light of the stipulation, the attorney examiner modified the procedural schedule once again to provide additional time for discovery and *testimony regarding the stipulation* filed on December 22, 2014.⁸

In a January 14, 2015 order, the Attorney Examiners set a deadline of February 5, 2015, for supplemental testimony, and they moved that deadline to March 2 in a subsequent order. Neither of the Attorney Examiners’ Entries, however, suggested that an intervenor could conduct discovery or file testimony on issues unrelated to the stipulation.

⁶ Stipulation and Recommendation, Dec. 22, 2014, at 10; *see also* Supplemental Testimony of Eileen M. Mikkelsen, Dec. 22, 2014, at 4:6-12.

⁷ Attorney Examiner Entry, Jan. 14, 2015, ¶ 6.

⁸ Attorney Examiner Entry, Feb. 4, 2015, ¶ 5 (emphasis added).

II. Argument

A. Section II of Mr. Baron's Testimony Should be Stricken Because It Does Not Relate to the Stipulation.

Where, as here, a party files witness testimony that is untimely, it is appropriate to strike those out-of-time portions of testimony.⁹ The deadline for intervenor testimony in this case was December 22, 2014. Although the Attorney Examiners provided a narrow exception to this deadline for “testimony regarding the stipulation,”¹⁰ the Attorney Examiners’ Entry did not open the door to the full range of issues in this proceeding. There can be no serious dispute that the supplemental discovery period and the allowance for supplemental testimony were due to the Companies’ filing of a stipulation. Nor can it can be disputed that any additional discovery or testimony were to be limited to new information regarding that stipulation.

Section II of Mr. Baron’s supplemental testimony disregards the clear limits that the Attorney Examiners placed on the scope of supplemental testimony. In his testimony, Mr. Baron offers policy testimony on aspects of the Companies’ proposed electric security plan and Rider RRS that were unchanged by the stipulation. In this section, Mr. Baron does not discuss the one aspect of Rider RRS that actually was affected by the

⁹ See, e.g., *In the Matter of the Application of Water and Sewer LLC for an Increase in Rates and Charges*, Case No. 03-318-WS-AIR (Nov. 14, 2003) (striking portions of testimony that were submitted approximately six weeks after the deadline for direct testimony).

¹⁰ Attorney Examiner Entry, Feb. 4, 2015, ¶ 5.

stipulation (*i.e.*, the method of calculation for certain customer classes).¹¹ Indeed, Mr. Baron describes this part of his testimony as being “limited to describing why the policy behind FirstEnergy’s proposal is sound.”¹² In Section II, Mr. Baron offers support for Rider RRS;¹³ opines on the reasonableness of the proposal “as a general policy matter”;¹⁴ offers opinions about the potential effects of Rider RRS and the implications of rejecting it;¹⁵ and opines on the legality of Rider RRS.¹⁶ Not once in this section of his testimony does Mr. Baron refer to any term of the stipulation. Not once in this section does Mr. Baron offer an opinion on a topic aside from the policy implications and purported legality of Rider RRS. In short, any of the opinions being offered in Section II could have been submitted by the December 22, 2014 deadline. Because this testimony is being submitted nearly 2 ½ months after the deadline, these portions of testimony should be stricken.

Mr. Baron appears to justify offering these opinions in supplemental testimony because the Rider RRS “would be established if the Commission approves the Stipulation,” and because the stipulation “recommend[s] adoption of the Economic

¹¹ *Cf.* Supplemental Testimony of Stephen J. Baron, Mar. 2, 2015, at 18-19 (discussing the stipulation’s proposed rate design changes to Rider RRS). Sierra Club does not seek to strike pages 18-19 of Mr. Baron’s testimony.

¹² *Id.* at 3:23-24.

¹³ *Id.* at 5:17 to 6:2.

¹⁴ *Id.* at 6:4-22.

¹⁵ *Id.* at 7:1 to 8:3, 8:13 to 9:2.

¹⁶ *Id.* at 8:5-11.

Stability Program.”¹⁷ This is not a legitimate basis for submitting out-of-time testimony on topics Mr. Baron could have testified about months ago. The additional discovery and supplemental testimony permitted by the Attorney Examiners’ January 14th order was limited to “new information.”¹⁸ If Mr. Baron’s rationale were credited, this would mean that parties could have submitted testimony on *any* aspect of the electric security plan, because every part of that plan “would be established” if the stipulation is approved.¹⁹ Section II of Mr. Baron’s testimony does not constitute “testimony regarding the stipulation.” Mr. Baron’s testimony relates instead to the Rider RRS proposal itself.

B. Those Intervenors That Complied With The Procedural Schedule Would Be Prejudiced if OEG’s Untimely Testimony is Permitted.

Sierra Club, and other intervenors, would be prejudiced if the above-identified lines of Mr. Baron’s testimony are allowed to be submitted. By submitting this testimony, OEG—a signatory of the stipulation—seeks an unfair advantage over those intervenors that complied with the procedure schedule.

This unfair advantage is particularly stark here, because, in the months since intervenor testimony was due, there have been several developments that could impact the assumptions underlying Rider RRS. Perhaps most importantly, the Commission issued its order denying Ohio Power Company’s proposal for an inter-affiliate subsidy

¹⁷ *Id.* at 5:17-19, 3:2-5.

¹⁸ Attorney Examiner Entry, Jan. 14, 2015, ¶ 6.

¹⁹ *See* Stipulation and Recommendation at 6-7.

similar to the one proposed by the Companies through Rider RRS. There have been other developments as well, such as recent changes to natural gas forward prices.

Sierra Club, and we presume other intervenors, would have liked the opportunity to provide updated testimony on these issues. But such testimony was not permitted by the procedural schedule established for this proceeding. The other intervenors would therefore be prejudiced if Mr. Baron's testimony on Rider RRS and the Economic Stability Program is allowed to remain.

C. Request for Expedited Ruling

Sierra Club respectfully requests that the Commission address this motion under its procedures for an expedited ruling. *See* O.A.C. § 4901-1-12(C). In order that this matter may be resolved by the time of the March 31, 2015 pre-hearing conference, Sierra Club requests that any party opposing this motion should file its response within seven days of this motion. As § 4901-1-12(C) provides, Sierra Club does not expect any need for a reply brief and can instead address this motion at the pre-hearing conference, if necessary.

III. Conclusion

For the foregoing reasons, Sierra Club respectfully requests that the Attorney Examiners strike the identified portions of the Supplemental Testimony of Stephen J. Baron.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Sierra Club's *Motion to Strike Portions of the Supplemental Testimony of Stephen J. Baron and Request for Expedited Ruling*, along with a Memorandum in Support, has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on March 20, 2015.

/s/ Christopher J. Allwein
Christopher J. Allwein

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Summary: Motion to Strike portions of the Supplemental Testimony of Stephen J. Baron and request for an Expedited Ruling electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB