

**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 )**

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**SIERRA CLUB’S MOTION TO STRIKE IN PART THE  
REBUTTAL TESTIMONY OF EILEEN M. MIKKELSEN**

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Through Ohio Administrative Code § 4901-1-12, Sierra Club moves to strike certain portions of the rebuttal testimony of Eileen M. Mikkelsen (“Mikkelsen Rebuttal Testimony”), filed in this proceeding on October 19, 2015 on behalf of The Ohio Edison Company, The Cleveland Electric Company, and The Toledo Edison Company (the “Companies”). As the attached memorandum in support demonstrates, the testimony Sierra Club seeks to strike regarding purported retail rate volatility is outside the scope of proper rebuttal testimony. The Companies could have and, in fact, did include testimony on these issues in their direct testimony, and the testimony offered by Ms. Mikkelsen is not responsive to any new evidence presented by intervenors in this proceeding. The Companies should not be permitted to expand on that testimony at this late stage in this proceeding under the guise of rebuttal testimony. Accordingly, Sierra Club respectfully requests that the Commission strike the following portions of the Mikkelsen Rebuttal Testimony:

- a) Page 2, Line 16 through Page 4, Line 17
- b) Page 4, Line 18 through Page 5, Line 7, including footnotes

c) Page 6, Line 7 through Page 7, Line 8

Dated: October 26, 2015

Respectfully submitted,

/s/ Tony G. Mendoza

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**MEMORANDUM IN SUPPORT OF  
SIERRA CLUB’S MOTION TO STRIKE IN PART THE  
REBUTTAL TESTIMONY OF EILEEN M. MIKKELSEN**

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In this proceeding, the Companies seek approval of an Electric Security Plan (“ESP”), which includes a proposed Retail Rate Stability Rider (“Rider RRS”). In their application, the Companies aver that Rider RRS is designed “[t]o address retail price volatility.” *See* Application at 1. Accordingly, to the extent they wished to do so, the Companies could and should have included information about purported retail rate volatility and the impact of Rider RRS on any such volatility in their application and direct testimony. Instead, the Companies provided testimony regarding purported volatility in wholesale markets, with the qualitative suggestion that wholesale volatility could lead to retail rate volatility, *see* Direct Testimony of Judah L. Rose (“Rose Direct Testimony”) at 21-33, and claims that staggered and laddered auctions and CRES contracts cannot fully ensure long-term price stability. Direct Testimony of Steven E. Strah (“Strah Direct Testimony”) at 11-13.

Now the Companies, through the Mikkelsen Rebuttal Testimony, attempt to provide evidence regarding purported retail rate volatility; the ability of Rider RRS to address any such volatility; and the inadequacy of staggering, laddering, and CRES contracts to mitigate volatility. In short, the Companies are improperly seeking to take a “free swing” at retail rate volatility issues by offering in rebuttal evidence that should have been included in the Companies’ case-in-chief. *In the Matter of the Application of The Toledo Edison Company for an Increase in Rates and Charges for Electric Service*, Case No. 86-2026-EL-AIR, 1987 WL 1466471 (Ohio P.U.C.) ¶ 7 (Sept. 9, 1987). Allowing the Companies to provide this additional testimony at this late hour is improperly outside the scope of rebuttal testimony. It would also prejudice intervenors as new testimony and data offered on rebuttal will not be subject to the scrutiny of written discovery and a deposition.

**A. Rebuttal Testimony Is Permitted Solely to Rebut New Evidence Presented by Intervenors With Evidence That Should Not Have Been Presented In Direct Testimony.**

Under Ohio law, the scope of rebuttal testimony is limited in two important ways. First, “the Commission has routinely limited rebuttal to testimony that a party could not have presented as part of their direct case.” *In re Ameritech Ohio’s Economic Costs*, Case No. 96-922-TP-UNC, 2001 WL 280125 (Ohio P.U.C.) ¶ 8 (Jan. 29, 2001); *see* Opinion and Order, Case No. 96-922-TP-UNC, at 24 (Oct. 4, 2001) (affirming ruling). Second, rebuttal testimony “must fall within the standard of being new evidence refuting prior testimony.” *In the Matter of the Application of Cincinnati Bell Telephone Company*, Case No. 84-1272-TP-AIR, 1985 WL 1171510 (Ohio P.U.C.) ¶ 10 (Dec. 17,

1985). Rebuttal testimony should, therefore, be permitted solely to rebut new evidence first presented by intervenors.

The Commission's decision in *Ameritech Ohio's Economic Costs* is instructive. In that case, Ameritech moved to strike rebuttal testimony that had been filed by several other parties. In doing so, the company argued that those parties' "rebuttal testimony, while purporting to respond to cross-examination responses of Ameritech witnesses, actually merely restates the [parties'] prior testimony . . . ." *In re Ameritech Ohio's Economic Costs*. ¶ 3. In opposing Ameritech's motion, the other parties asserted that "they should be free to present on rebuttal any evidence to 'explain, repel, counteract, or disprove facts given in evidence by the adverse party.'" *Id.* ¶ 4. They further claimed "that it is appropriate for their witnesses on rebuttal to refer back to their direct testimony and such references do not make the rebuttal testimony cumulative," and that "it is acceptable on rebuttal to respond to alleged failures by Ameritech witnesses to explain their viewpoints." *Id.*

The Attorney Examiner granted Ameritech's motion, concluding that:

[e]ven a cursory review of the testimony reveals that the [other parties'] witnesses are not attempting to rebut new evidence elicited during cross-examination or on redirect examination. Rather, under the guise of offering legitimate rebuttal testimony, the [parties'] witnesses simply repeat or expand upon positions previously taken by the [parties] in their direct cases.

*Id.* ¶ 5. The Attorney Examiner emphasized that rebuttal testimony is only permissible as "a chance to respond to evidence that could not have been presented as part of their direct cases." *Id.* ¶ 8. The same standards apply here.

**B. Ms. Mikkelsen Offers Testimony that is Outside the Scope of Proper Rebuttal.**

Accordingly, in this proceeding, to be permissible, rebuttal testimony must i) directly rebut new evidence presented by intervenors, and ii) consist of information that should not have been presented in the Companies' direct testimony. As demonstrated below, the identified portions of the Mikkelsen Rebuttal Testimony fail this test.

**1. On Page 2, Line 16 through Page 4, Line 17, Ms. Mikkelsen Offers Testimony on Retail Rate Volatility That Is Outside The Scope Of Rebuttal.**

In her Rebuttal Testimony, Ms. Mikkelsen offers three "examples" of purported "retail rate volatility over the last few years." Mikkelsen Rebuttal Testimony at 2. First, Ms. Mikkelsen sets forth Day-Ahead and Real Time hourly LMPs in PJM for a timeframe of June 2011 to May 2013 compared to a timeframe of June 2013 to May 2015 to claim that customers taking CRES service under a variable price contract face volatility. *Id.* at 2-3. Second, Ms. Mikkelsen claims that an increase in Economic Buy Through periods for Rider ELR customers demonstrates retail price volatility. *Id.* at 3. Third, Ms. Mikkelsen contends that CRES offers for shopping customers from December 2013, March 2014, and May 2014 show an increase in retail rate volatility after the Polar Vortex. *Id.* at 4.

All of this testimony is outside the scope of proper rebuttal. First, the Companies do not identify any "new evidence" from intervenors that they seek to rebut in this portion of Ms. Mikkelsen's testimony. Though this portion of Ms. Mikkelsen's testimony is styled as a response to the testimony of Sierra Club witness Tyler Comings,

the Mikkelsen Rebuttal Testimony never cites to any specific portion of Mr. Comings's testimony, nor does it point to any "new evidence" he offered. Instead, the Companies note only that Mr. Comings observed that there is "no evidence" of retail rate volatility in the record. *Id.* at Page 2, Lines 16-17. Here, the Companies effectively concede that they are not responding to any "new evidence," but instead wish to supplement the record in response to Mr. Comings's observation that the Companies offered no evidence on a particular issue.

Second, Ms. Mikkelsen's testimony regarding retail rate volatility should not be permitted because the Companies could and should have included this testimony in their direct testimony. As previously noted, the Companies' application claims that Rider RRS is designed "[t]o address retail price volatility," *see* Application at 1, and both witnesses Judah Rose and Steven Strah presented information regarding rate volatility and ways to address it in their direct testimony. In short, the Companies could have provided the testimony offered in the identified portion of the Mikkelsen Rebuttal Testimony either through her direct testimony or through other witnesses, yet the Companies chose not to do so.

Accordingly, the testimony from Page 2, Line 16 through Page 4, Line 17 of the Mikkelsen Rebuttal Testimony should be stricken as beyond the scope of proper rebuttal.

**2. On Page 4, Line 18 through Page 5, Line 7, Ms. Mikkelsen Offers Testimony on the Stability Value of Rider RRS That Is Outside The Scope Of Proper Rebuttal.**

In her Rebuttal Testimony, Ms. Mikkelsen opines that "[o]ne way to look at the mitigation value of Rider RRS is to compare the total value of Rider RRS to the

estimated cost of generation or the total electric bill over the term of the Economic Stability Program.” Mikkelsen Rebuttal Testimony at Page 4, Lines 21-23. The Testimony then provides a calculation of such purported mitigation value.

This testimony is outside the scope of proper rebuttal. First, the Companies do not identify the “new evidence” that they seek to rebut in these lines. They simply refer to the testimony of Mr. Comings and Mr. Kalt without any citation to any specific “new evidence” offered by either witness, referring only to the “concern” of these witnesses. *Id.* at Page 4, Line 18. A “concern” is not specific “new evidence,” and allowing rebuttal testimony merely to address a generalized concern identified by intervenors would render the established limits on rebuttal testimony a virtual nullity.

Second, to the extent the Companies wished to include the calculation offered by Ms. Mikkelsen, they easily could have done so either through the direct testimony of Ms. Mikkelsen or another witness. The Companies chose not to provide this calculation in direct testimony and should not be permitted to provide it now.

**3. On Page 5, Line 8 through Page 7, Line 8, Ms. Mikkelsen Offers Testimony on Staggering, Laddering, and Fixed-Price Contracts That Is Outside The Scope Of Proper Rebuttal.**

The portion of Ms. Mikkelsen’s rebuttal testimony regarding the adequacy of staggering, laddering, and fixed-price contracts for addressing rate volatility is also beyond the scope of proper rebuttal. In particular, Ms. Mikkelsen opines that although staggering, laddering, and fixed price contracts can play some role in mitigating short-term rate volatility, they purportedly do not protect against long-term rate volatility or serve as a hedge.



This testimony is, again, outside the scope of proper rebuttal. First, the Companies do not identify any “new evidence” that they seek to rebut in these lines. They simply refer generally to the testimony of Mr. Choueiki without citation to any specific “new evidence” offered by him. *Id.* at Page 5, Line 18.

Second, to the extent the Companies wished to include discussion of the purported limitations of staggering, laddering, and fixed-price contracts as retail rate stabilization measures, the Companies could have and, in fact, did do so in their direct testimony. For example, Mr. Strah offered testimony responding to the question “Can Rate Volatility Be Mitigated Through Staggered and Laddered Auctions?” Strah Direct Testimony at Page 11, Lines 8-9. Further, Ms. Mikkelsen herself made passing reference to this issue in her direct testimony, stating “Further, the prices that non-shopping customers will pay will be based on laddered procurements and blended prices that will mitigate but not eliminate the effects of the inevitable volatility in the market prices.” Direct Testimony of Eileen M. Mikkelsen at Page 29, Lines 5-8. Similarly, Mr. Strah opined in his direct testimony about the purported limitations of fixed-price contracts in response to the question, “Are CRES Providers Offering Equivalent Long-Term Rate Mitigation Mechanisms to Residential Customers?” Strah Direct Testimony at 13. The Companies could have provided the expansion on this topic offered in the Mikkelsen Rebuttal Testimony in the direct testimony of Mr. Strah or another witness, but chose not to do so. There is no basis for permitting the Companies to do so at this late hour.

**C. Intervenor Will Be Prejudiced If the Identified Portions of the Mikkelsen Rebuttal Testimony Are Admitted.**

Permitting this testimony would not only violate well-established standards regarding the proper scope of rebuttal testimony, but intervenors would also be prejudiced. Although Ms. Mikkelsen's Rebuttal Testimony provides a number of new calculations and opinions without any supporting workpapers (and virtually no citations to specific sources of the information presented), intervenors have not been provided the opportunity for either written discovery or a deposition regarding that testimony. Accordingly, intervenors' ability to investigate and assess the validity and reasonableness of these portions of the Mikkelsen Rebuttal Testimony has been greatly hindered.

\* \* \*

For the foregoing reasons, Sierra Club respectfully requests that the Commission grant this motion and that the identified portions of the Rebuttal Testimony of Eileen M. Mikkelsen be stricken.

Dated: October 26, 2015

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 Rebuttal Testimony of Eileen M. Mikkelsen, 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 on October 26, 2015.

/s/ Tony G. Mendoza

Tony G. Mendoza

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