

**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 Approval of Their	)	Case No. 16-0743-EL-POR
Energy Efficiency and Peak Demand	)	
Reduction Program Portfolio Plans for	)	
2017 through 2019	)	

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**MOTION TO MODIFY STIPULATED PROCEDURAL SCHEDULE BY  
THE ENVIRONMENTAL LAW & POLICY CENTER AND THE NATURAL  
RESOURCES DEFENSE COUNCIL**

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On April 15, 2016, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or “Companies”) filed an application for approval of their proposed Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019 (“Application”). The Application included a proposed procedural schedule for review of this Application by the Public Utilities Commission of Ohio (“Commission”). On May 5, 2016, FirstEnergy and other intervening parties filed a Stipulated Procedural Schedule proposing an alternative schedule as follows:

Objections to Plans and Motions to Intervene Due:	June 14, 2016
Intervenor Testimony Due:	June 28, 2016
Intervenor and Companies’ Discovery Deadline (except Depositions):	July 5, 2016
Discovery Deadline for Discovery Served on or after June 28, 2016 to July 5, 2016:	July 15, 2016
Evidentiary Hearings:	July 25, 2016
Briefs and Reply Briefs:	TBD
Commission Order:	By September 30, 2016

As noted in that filing, the Environmental Law & Policy Center (“ELPC”) and Natural Resources Defense Council (“NRDC”) have no objection to these stipulated dates. However, in this Motion, ELPC and NRDC respectfully request that the Commission add a deadline for the Companies to file any rebuttal testimony by July 18, 2016, before the evidentiary hearing commences.

This approach will serve both the parties’ and the Commission’s interest in an efficient process that still allows for full and fair litigation of the merits. We acknowledge that the usual practice in Commission proceedings is for the utility to file rebuttal testimony during the hearing, after the conclusion of direct testimony and cross-examination of all parties’ witnesses. However, this practice has never been formally considered or approved by the Commission, and is inconsistent with the prevailing approach in other jurisdictions, including those where FirstEnergy’s sister distribution utilities operate. Most importantly, this practice undermines the adequacy of the litigation process by depriving intervenor parties of sufficient time to analyze and appropriately respond to rebuttal testimony.

ELPC and NRDC respectfully request this Commission grant their motion to modify the Stipulated Procedural Schedule for these reasons and those set forth in more detail in the attached Memorandum in Support.

May 10, 2016

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE MOTION TO MODIFY STIPULATED  
PROCEDURAL SCHEDULE BY THE ENVIRONMENTAL LAW & POLICY CENTER  
AND THE NATURAL RESOURCES DEFENSE COUNCIL**

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The Environmental Law & Policy Center (“ELPC”) and Natural Resources Defense Council (“NRDC”) respectfully seek an amendment of the Stipulated Procedural Schedule filed by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or “Companies”) along with other intervening parties on May 5, 2016. ELPC and NRDC do not object to the proposed stipulated dates in that filing. However, the addition of a deadline for filing of the Companies’ rebuttal testimony by July 18, 2016, prior to the proposed start of hearing on July 25, 2016, would promote a more efficient litigation process without prejudicing any other party. It would also be consistent with prevailing practice in other jurisdictions, including those in which FirstEnergy’s sister distribution utilities provide service.

Current practice before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) is for a utility to submit rebuttal testimony in the middle of an evidentiary hearing.<sup>1</sup> However, this approach unnecessarily extends the litigation process and may prejudice

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<sup>1</sup> It is not unheard of for an applicant before the Commission to pre-file rebuttal testimony prior to the start of the evidentiary hearing. *See, e.g., In re Complaint of Revolution Communications,*

intervening parties, without any commensurate benefit. In order to provide intervening parties with some time to analyze and prepare cross-examination questions regarding rebuttal testimony, it is common for the Commission to temporarily suspend an ongoing hearing and then recall rebuttal witnesses who have already been cross-examined regarding their direct testimony. In practical terms, this means that hearings often take longer than they would if the utility simply pre-filed rebuttal testimony at some point before the beginning of the hearing.

The filing of rebuttal testimony in the midst of a hearing also inevitably imposes significant constraints on the ability of intervening parties to adequately assess the substance of a utility's rebuttal testimony, particularly if the rebuttal testimony involves technical issues that require in-depth analysis or consultation with outside experts. Given this limitation, intervening parties may not have a sufficient opportunity to prepare cross-examination questions or gather documents to introduce in response to the rebuttal testimony. This restricted scrutiny of rebuttal testimony may in turn result in an inadequate evidentiary record for the Commission's consideration.

Changing this practice to require filing of rebuttal testimony before the evidentiary hearing in this case would not unduly prejudice the Companies. Notably, FirstEnergy's sister distribution utilities operate in other jurisdictions that have all provided for pre-filing of rebuttal testimony before the evidentiary hearing in proceedings involving FirstEnergy. *E.g., FirstEnergy*

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*Ltd. Against AT&T Ohio for Unjust and Unreasonable Billings*, Case No. 06-427-TP-CSS, Opinion and Order (Feb. 4, 2009); *In the Matter of the Application of the East Ohio Gas Co. for Approval of a Plan to Restructure Its Commodity Service Function*, Case No. 05-474-GA-ATA, Opinion and Order (May 26, 2006); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 27, 2006); *In the Matter of the Application of Water and Sewer LLC for an Increase in Rates and Charges*, Case No. 03-318-WS-AIR, Entry (Oct. 16, 2003).

*Corp.*, Case No. 9233, 2011 Md. PSC LEXIS 5 (Jan. 18, 2011); *In re Appeal of Jersey Central Power & Light Co.*, Docket No. E009010010, 2009 N.J. PUC LEXIS 86 (Apr. 27, 2009); *In re Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Co.*, Docket No. EM00110870, 2001 N.J. PUC LEXIS 155 (Oct. 9, 2001); *Petition of West Penn Power*, Case No. M-2009-2093218, 2010 Pa. PUC LEXIS 1969 (Dec. 17, 2010); *Application of the Potomac Edison Co.*, Case No. PUE-2009-00028, 2009 Va. PUC LEXIS 601 (July 31, 2009); *Monongahela Power Co. and the Potomac Edison Co.*, Case No. 15-1433-E-P, 2015 W. Va. PUC LEXIS 2029 (Oct. 23, 2015); *Monongahela Power Co. and the Potomac Edison Co.*, Case No. 14-1550-E-P, 2014 W. Va. PUC LEXIS 2307 (Nov. 6, 2014). Other neighboring jurisdictions likewise regularly require filing of rebuttal testimony before any evidentiary hearing begins. *E.g.*, *In re Regulatory Reviews, Revisions, Determinations, and/or Approvals Necessary for DTE Electric Co. to Fully Comply with Public Act 295*, Case No. U-17793, 2015 Mich. PSC LEXIS 278 (Oct. 7, 2015); *In re Application of Consumers Energy Co. for Approval of an Amended Energy Optimization Plan*, Case No. U-16670, 2012 Mich. PSC LEXIS 126 (Apr. 17, 2012); *In the Matter of Application of Kentucky Power Co.*, Case No. 2014-00396, 2015 Ky. PUC LEXIS 407 (Apr. 21, 2015); *Application of Wisconsin Energy Corporation for Approval to Acquire the Outstanding Common Stock of Integrys Energy Group, Inc.*, Case No. 9400-YO-100, 2014 Wisc. PUC LEXIS 408 (Oct. 13, 2014); *Petition of Duke Energy Indiana, Inc.*, Cause No. 43079 DSM 6, 2012 Ind. PUC LEXIS 388 (Dec. 19, 2012); *Commonwealth Edison Company Approval of the Energy Efficiency and Demand Response Plan*, Case No. 13-0495, 2014 Ill. PUC LEXIS 1 (Jan. 2, 2014).

Although there appears to be little substantive discussion of the rules and practices regarding rebuttal testimony by state public utilities commissions, the Mississippi Public Service Commission has explained that parties should properly file rebuttal testimony before a hearing begins:

In a traditional adjudicative proceeding, a party submits its direct and rebuttal testimony, prior to hearing. At hearing, the party faces cross examination on all its pre-filed testimony. The party has no opportunity, after cross examination, to submit new rebuttal testimony to “clean up” any problems or fill in holes that were exposed during the cross examination of its witnesses.

*In re Petition of Mississippi Power Co. for a Certificate of Public Convenience and Necessity*, Docket No. 2009-UA-14, 2009 Miss. PUC LEXIS 147, 10-11 (Sept. 10, 2009). The Commission should apply the same approach here to allow intervenors adequate time to analyze the Companies’ rebuttal testimony and prepare cross-examination.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion was served by electronic mail,  
upon the following Parties of Record on May 10, 2016.

/s Madeline Fleisher  
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Summary: Motion Motion to Modify Stipulated Procedural Schedule electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center and Natural Resources Defense Council