

**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)

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
MOTION TO MODIFY STIPULATED PROCEDURAL SCHEDULE BY THE
ENVIRONMENTAL LAW & POLICY CENTER AND THE NATURAL RESOURCES
DEFENSE COUNCIL**

On May 10, 2016, The Environmental Law & Policy Center (“ELPC”) and The Natural Resources Defense Council (“NRDC”) filed a Motion to Modify the Stipulated Procedural Schedule filed by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (“Companies”) and several intervening parties. Specifically, although ELPC and NRDC did not oppose the dates in the Stipulated Procedural Schedule, they seek to modify the schedule to add a rebuttal testimony deadline of July 18, 2016, in contravention of long-standing Commission practice. For the reasons discussed below, the Commission should deny ELPC and NRDC’s Motion.

First, as mentioned above and admitted by ELPC and NRDC in their Motion, the long-standing practice at the Commission has been to allow for the utility to file rebuttal testimony after the conclusion of direct testimony and cross-examination of all parties’ witnesses.¹ Although ELPC and NRDC complain that the rebuttal practice “has never been formally considered or approved by the Commission,”² they fail to explain how the circumstances in this case, involving

¹ Motion at 2; Memorandum in Support at 1.

² Motion at 2.

only three utilities on a discrete issue, is the appropriate forum to change this practice that will have far-reaching consequences for other parties who are not in this case. As evidenced by the laundry list of cases from other jurisdictions that ELPC and NRDC cite, they are seeking a wholesale change in procedural practice in Ohio. The more appropriate forum for ELPC and NRDC's wholesale complaints regarding this Commission practice would be a rulemaking process on the Commission's procedural rules contained in Ohio Administrative Code Chapter 4901-1 - not in this individual case.

Indeed, the Commission should ignore the list of cases from other jurisdictions cited by ELPC and NRDC in an effort to change its long-standing practice that has been appropriate for Ohio.³ ELPC and NRDC have not identified the policy reasons as to why those jurisdictions chose to adopt that practice, whether the rules in those jurisdictions⁴ permit rebuttal after a hearing has commenced or why Ohio should adopt this practice.⁵ Again, if the Commission wants to follow other jurisdictions' practice on this issue that decision should be made in a rulemaking process where all interested parties will have the opportunity to comment, especially when a ruling in this case could affect every other utility in the state who are not parties to this case and are not aware that this issue is even being raised.

Second, ELPC and NRDC improperly presume that rebuttal testimony is only for the purpose of rebutting pre-filed direct testimony.⁶ This is wrong. Rebuttal testimony is at the

³ Likewise, the Commission should ignore the smattering of cases from Ohio because they are simply citations to various procedural entries in cases that do not discuss any policy considerations.

⁴ ELPC and NRDC attempt to utilize a Mississippi Public Service Commission ("PSC") case to support its position. (Memorandum in Support at 4.) This case should be disregarded because the Mississippi PSC has a completely different hearing process than Ohio in that cross-examination is conducted by a panel which includes Commissioners. Moreover, if a utility were to utilize rebuttal testimony to "clean up" its own witnesses' testimonies (as the Mississippi quote suggests), it would certainly be subject to a motion to strike as improper rebuttal.

⁵ ELPC and NRDC admit this in their Memorandum in Support at page 3 ("there appears to be little substantive discussion of the rules and practices regarding rebuttal testimony").

⁶ Memorandum in Support at 4.

discretion of the Attorney Examiner, depends on the circumstances of the case, and is permissible for purposes of contradicting the opponent's evidence.⁷ Therefore, the Attorney Examiner will not be able to fully assess the timing or substance of rebuttal testimony until the hearing on all witnesses have been presented and then determine, within his or her discretion, the process for rebuttal testimony.

Third, ELPC and NRDC allege that setting a deadline would promote a "more efficient litigation process without prejudicing any other party" and argue that "hearings often take longer than they would if the utility simply pre-filed rebuttal testimony."⁸ Yet, ELPC and NRDC do not cite to one circumstance where a hearing took longer than it would have had the utility pre-filed rebuttal testimony. In fact, ELPC and NRDC's proposal would make the hearing process less efficient. An intervening witness pre-files direct expert testimony, but that witness still has the opportunity to be cross-examined. Depending on the cross examination, issues appropriate for rebuttal may arise. If a utility pre-files rebuttal testimony and new issues arise on cross of the intervening witness, the utility would have to pursue a second rebuttal testimony. It is more efficient to have a utility file rebuttal testimony after direct testimony closes so that a utility can fully respond to direct testimony including cross examination responses. In light of the utility having the burden of proof, a utility must be given the opportunity to present comprehensive rebuttal. ELPC and NRDC's recommendation would surely prevent this. On the other hand,

⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al.*, Opinion and Order at 23 (April 2, 2015) citing *In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control*, Case No. 98-1398-TP-AMT, Entry at 7 (July 16, 1999) ("Rebuttal testimony is appropriate for the purpose of contradicting the opponent's evidence. Such evidence should be utilized for the purpose of demonstrating that intervenors' criticisms were actually addressed in joint applicants' direct case or that such criticisms are unjustified based on the existing record.")

⁸ Memorandum in Support at 1-2.

allowing cross examination to be completed before rebuttal is filed may eliminate or reduce the need for rebuttal – which actually does make the hearing more efficient.

Last, ELPC and NRDC’s complaints about the rebuttal practice “undermining the adequacy of the litigation process by depriving intervenor parties of sufficient time to analyze and appropriately respond to rebuttal testimony”⁹ are speculative at best. The Commission should not change its long-standing practice based only on speculation about whether ELPC and NRDC will have enough time to analyze and respond to testimony at this stage of the proceeding when no testimony has been filed at all.¹⁰ Again, it is at the discretion of the Attorney Examiner, under the circumstances of the case, to determine the best process for rebuttal testimony. For all of those reasons, the Commission should deny ELPC and NRDC’s Motion.

Respectfully submitted,

/s/ Carrie M. Dunn
Carrie M. Dunn (0076952)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-2352 (tel)
(330) 384-3875 (fax)
cdunn@firstenergycorp.com

Kathy J. Kolich (0038555)
Kolich & Associates, LLC
1521 Hightower Drive
Uniontown, OH 44685
(330) 316-2378 (tel)
kjklaw@yahoo.com

Attorneys for Ohio Edison Company, The
Cleveland Electric Illuminating Company
and The Toledo Edison Company

⁹ *Id.* Memorandum at 2.

¹⁰ Noticeably, ELPC and NRDC have not cited to any authority finding that the rebuttal practice has deprived parties of their due process rights which is what they seem to argue here.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Stipulated Procedural Schedule was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 11th day of May, 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 the parties via electronic mail.

/s/ Carrie M. Dunn

One of Attorneys for Ohio Edison Company,
The Cleveland Electric Illuminating Company
and The Toledo Edison Company

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/11/2016 5:20:01 PM

in

Case No(s). 16-0743-EL-POR

Summary: Memorandum Contra Motion to Modify Stipulated Procedural Scheduled Filed by The Environmental Law & Policy Center and The Natural Resources Defense Council electronically filed by Ms. Carrie M Dunn on behalf of The Toledo Edison Company and The Cleveland Electric Illuminating Company and Ohio Edison Company