

**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)

**REPLY IN SUPPORT OF 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 Natural Resources Defense Council (“NRDC”) filed a Motion seeking a modification of the proposed procedural schedule in this case to include a deadline for filing of rebuttal testimony before the beginning of the evidentiary hearing in this case. As explained in that Motion, that approach would promote efficiency of the litigation and would also ensure an adequate record for decision by the Public Utilities Commission of Ohio (“Commission”) by providing an adequate opportunity for intervening parties to contest new arguments or evidence presented on rebuttal.

The Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or “Companies”) principally oppose this Motion on two grounds. First, the Companies assert that the appropriate venue for addressing this issue is in an official rulemaking by the Commission. FirstEnergy Mem. Contra at 1-2. While we would certainly be open to participating in such a proceeding, the fact is that there is no such rulemaking on the horizon. Meanwhile, the current practice of filing rebuttal testimony in the middle of hearing has itself been implemented on a case-by-case basis, and should

therefore be open to reconsideration in any particular case. Changing that practice here will not preclude parties to future proceedings from arguing that a different approach is appropriate for their circumstances.

Second, FirstEnergy asserts that requiring the filing of rebuttal testimony before hearing may prevent it from being able to “contradict[] the opponent’s evidence,” especially if it loses the opportunity to respond to evidence elicited on cross-examination of intervenor witnesses. Mem. Contra at 3. This argument incorrectly supposes that the right to present testimony rebutting an opponent’s case includes the right to rebut testimony that the Company *itself* elicits itself on cross-examination. Ohio state courts have not considered the scope of rebuttal testimony to extend that far, ruling that a party may not present a rebuttal witness to address testimony that its own counsel elicited from an opponent’s witness on cross-examination. *Weimer v. Anzevino*, 122 Ohio App.3d 720, 726, 702 N.E.2d 940 (7th Dist. 1997) (“[A]ppellant cannot rebut evidence that was introduced by appellant's own counsel. Appellant may rebut evidence adverse to her side, but that evidence must be introduced by the opposing party and not by appellant herself.”); *see also, e.g., State v. Carrasquillo*, 9th Dist. Lorain No. 09CA009639, 2010-Ohio-5063, ¶ 17 (following *Weimer*).

Furthermore, the Companies’ theoretical objection about intervenor witness testimony on cross-examination is belied by the fact that FirstEnergy will have a full opportunity to conduct discovery and depose intervenor witnesses before filing rebuttal testimony. Efficient use of these processes will ensure that the Companies have a full understanding of the intervenors’ case. On the other hand, it is self-evident that stopping a hearing in the middle for filing of rebuttal testimony and resuming for additional cross-examination – usually of witnesses who have already filed direct testimony and been cross-examined once – is less efficient than consolidating

all of a witness's cross-examination in one session. *See, e.g.*, Case No. 14-1297-EL-SSO (initial hearing adjourned for filing of rebuttal testimony by multiple witnesses who had already offered direct testimony).

We respectfully request that the Commission grant the Motion to Modify the Stipulated Procedural Schedule for these reasons and those set forth in the original Motion.

May 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply was served by electronic mail, upon the following Parties of Record on May 18, 2016.

/s Madeline Fleisher
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Summary: Reply Reply in Support of Motion to Modify Stipulated Procedural Schedule electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center