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 Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	)))))))	**Case No. 14-1297-EL-SSO**

MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE PORTIONS OF SIERRA CLUB'S POST-REHEARING REPLY BRIEF

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") respectfully move to strike the following portions of Sierra Club's Post-Rehearing Reply Brief:

1. Page 17, footnote 72, and the accompanying text;
2. Page 22, footnote 96;
3. Page 23, footnote 104, and the accompanying text;
4. Page 23, the sentencing beginning with "Mr. Rose's natural gas…" and ending with "…respectively";
5. Page 24, footnotes 109 and 110, and the accompanying text; and
6. The first full paragraph on Page 20 (beginning with "For example…") to the end of the carryover paragraph on page 23 (ending with "…meritless") in its entirety.

The Commission should strike this material from Sierra Club's post-rehearing reply brief for two reasons. First, the material contained in the first five points above relies on testimony, and exhibits to that testimony, which the Attorney Examiners excluded from the record in a series of routine evidentiary rulings as either cumulative or beyond the scope of the hearing on rehearing. Second, the material in the sixth point constitutes a procedurally improper *de facto*

sur-reply to arguments that the Companies made in their original Reply Brief that was filed in this proceeding on February 26, 2016, some seven months ago.

As demonstrated in the attached memorandum in support, the Commission should grant this motion and strike the relevant portions of Sierra Club's Post-Rehearing Reply Brief identified above.

Date: September 2, 2016

Respectfully submitted,

/s/ David A. Kutik

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MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO STRIKE PORTIONS OF SIERRA CLUB'S POST-REHEARING REPLY BRIEF

I. OVERVIEW

The Commission should strike portions of Sierra Club's Post-Rehearing Reply Brief for two reasons. First, in its Opinion and Order in this proceeding, dated March 31, 2016 (the "March 31 Order"), the Commission made clear that "parties should not rely upon evidence which has been stricken from the record." March 31 Order, p. 37. Sierra Club, however, does just that here. In a series of footnotes and accompanying portions of text in its Post-Rehearing Reply Brief, Sierra Club presents arguments improperly based on testimony that the Attorney Examiners struck in a series of rulings. Sierra Club apparently believes that it can do so because it "proffered" the stricken material at the hearing on rehearing and ostensibly does so once again in its rehearing reply brief. Sierra Club misunderstands the rules. An evidentiary proffer simply preserves a party's right to appellate review of an adverse evidentiary ruling; it in no way provides that party with the license to cite such material at will under the guise of a "proffer" in its post-hearing briefing.

Sierra Club also apparently believes that, as part of its rehearing reply brief, Sierra Club may insert a *de facto* sur-reply to the Companies' original Reply Brief in this proceeding. No

such right exists. As demonstrated below, the Commission thus should grant the Companies' motion to strike.

II. LAW AND ARGUMENT

A. "Proffered" Testimony That Has Been Excluded From The Evidence Of Record May Not Be Relied Upon As Evidence On Brief

Following settled Ohio law, the purpose of an evidentiary proffer at a hearing is to preserve the putative evidence for appellate review subsequent to an adverse evidentiary ruling. *See, e.g., Markel v. Markel*, 2004 Ohio App. LEXIS 3073, *4 (Ohio Ct. App., Ashland County June 30, 2004) ("The purpose of a proffer is to preserve the evidence for a reviewing court."); *Bentivegna v. Sands*, 1991 Ohio App. LEXIS 3450, *7 (Ohio Ct. App., Athens County July 9, 1991) (concurring opinion) ("The purpose of a proffer is so that the appellate court will know the nature of the evidence that was to be presented."); *State v. Grubb,* 28 Ohio St. 3d 199, 203 (1986) (evidence must be proffered at trial to preserve any objection on the record for purposes of appeal). As a corollary, a reviewing court or tribunal should not rely on merely proffered but properly excluded material when rendering its decision. *See, e.g.*, *Bethesda Hosp. v. Fowler*, 1978 Ohio App. LEXIS 8732, *26-27 (Ohio Ct. App., Muskingum County Feb. 22, 1978) (reversing and remanding Court of Common Pleas decision which vacated an order from the Board of Review, Ohio Bureau of Employment Services because the lower court failed to make a determination "based solely upon the evidence of record" and instead improperly relied upon "evidence proffered but properly excluded" from consideration).

The Commission concurs: "[T]he Commission observes that a proffer of evidence is meant to place a witness's response into the record after an objection to counsel's question has been sustained. The purpose of the proffer is to enable a reviewing court to determine whether or not the testimony should have been admitted." *In the Matter of the Applications of TNT Holland*

Motor Express, Inc. to Amend Certificates Nos. 300-R & 407-R., Case No. 89-582-TR-AAC, 1993 WL 13744636, *1, Opinion and Order (Aug. 12, 1993).

Accordingly, a party may not cite to and rely upon proffered evidence that has otherwise been stricken from the record. But, Sierra Club, in a series of footnotes and accompanying portions of text in its Post-Rehearing Reply Brief, improperly seeks to do just that. For example, at page 17, footnote 72 of its Post-Rehearing Reply Brief, Sierra Club, in the sentence beginning "Using up-to-date market forecasts…" cites directly to material from the rehearing testimonies of OCC/NOAC witness Wilson, Sierra Club witness Comings, and P3/EPSA witness Kalt that the Attorney Examiners struck as cumulative and/or beyond the scope of hearing on rehearing. *See* Rehearing Tr. Vol. IV, 780:9-11; 801:1-803:7 (Comings Rehearing Testimony); Rehearing Tr. Vol. IV, 862:2-9; 864:18-866:10, 875:12-21; 882:7-10 (Wilson Rehearing Testimony); Rehearing Tr. Vol. V, 1127:10-20; 1149:13-1151:24 (Kalt Rehearing Testimony) (striking, among other things, the entirety of the material referenced in Sierra Club Post-Rehearing Reply Brief, footnote 72 and the accompanying text).[1]

Likewise, at page 22, footnote 96, Sierra Club cites to and relies upon an exhibit to the rehearing testimony of Sierra Club witness Comings that the Attorney Examiners properly struck from the record; all erstwhile "proffers" aside it cannot count as evidence of record here. *See* Rehearing Tr. Vol. IV, 780:9-11; 801:1-803:7.

Again, at page 23, footnote 104 and the accompanying text, Sierra Club cites as evidence of record certain NYMEX natural gas forwards from Mr. Comings' rehearing testimony that were the subject of the Companies' successful motion to strike. *See* Rehearing Tr. Vol. IV,

[1] In their Post-Rehearing Reply Brief, the Companies addressed at length the propriety of the Attorney Examiners' evidentiary rulings striking these portions of intervenor rehearing testimony as cumulative, beyond the scope of hearing on rehearing, or hearsay. *See* Companies' Post-Hearing Reply, pp. 164-188 (Aug. 29, 2016). The Companies incorporate by reference those arguments here.

780:9-11; 801:1-803:7. In the sentence on page 23 following the accompanying text to footnote 104 (beginning with "Mr. Rose's natural gas" and ending with "respectively"), Sierra Club then improperly relies on these stricken NYMEX forwards in an attempt to criticize Mr. Rose's natural gas forecasts.

Similarly, at page 24, footnotes 109 and 110, and the accompanying text, Sierra Club makes extensive reference to, and relies explicitly upon, discussions by Mr. Comings of various updated natural gas forecasts from ICF International, PJM and the U.S. Energy Information Administration, that the Attorney Examiners struck from Mr. Comings' rehearing testimony as beyond the scope of rehearing.[2] *See* Rehearing Tr. Vol. IV, 780:9-11; 801:1-803:7.

In blatant disregard of the above authority and the March 31 Order, as well as the Attorney Examiners' evidentiary rulings, Sierra Club seeks to excuse this improper behavior on brief with the following disclaimer, repeated essentially verbatim three times in three footnotes on three successive pages of its rehearing reply brief:

> While the Attorney Examiners granted FirstEnergy's motion to strike Mr. Coming's presentation of these market forwards from the record, the Commission should reverse that ruling and admit such evidence and testimony into the record for the reasons set forth at pages 28 to 32 of Sierra Club's initial brief on rehearing.

Sierra Club Post-Rehearing Reply Brief, p. 23, n. 104. *See also id*, p. 24, n. 108; p. 22, n. 96. These improper ad-hoc attempts to justify relying upon such excluded material occur, to no surprise, immediately prior to or after Sierra Club cites the very excluded material in question as if, by mere proffer, it now constitutes part of the evidentiary record – which, of course, it does not. Again, a proffer does no more than preserve the right to seek review of an evidentiary ruling

[2] As the Attorney Examiners properly found: "[W]e are not going to spend our limited hearing time, and it wasn't within the scope of this hearing, to relitigate all of the projections which the Commission thoroughly addressed in its Opinion and Order in this proceeding." Rehearing Tr. Vol. IV, p. 884.

that has excluded certain material from the evidence of record; it is not a license to rely on such material as *bona fide* evidence pending review. *See, e.g.*, *Markel* at *4; *Bentivegna* at *7; *Bethesda Hosp.* at *26-27; *In the Matter of the Applications of TNT Holland* at *1. The legally baseless contrivance contained in the phrase "Sierra Club hereby proffers" does nothing to upend this result. Sierra Club Post-Rehearing Reply Brief, p. 24. Accordingly, the Commission should strike this material from Sierra Club's Post-Rehearing Reply Brief.

B. Sierra Club's *De Facto* Sur-reply Contained In Its Post-Rehearing Reply Brief Is Procedurally Improper

From the top of page 20 (with the sentence beginning "For example….") to the end of the carryover paragraph on page 23 (ending with the word "meritless") of its Post-Rehearing Reply Brief, Sierra Club repeatedly attacks claims and arguments that the Companies raised in their original Reply Brief filed on February 26, 2016. The Commission reviewed, considered, and accepted these arguments and claims in its March 31 Order. Indeed, in those three-plus pages Sierra Club cites to arguments and claims from the Companies' original Reply Brief in nine separate footnotes. *See* Sierra Club Post-Rehearing Reply Brief, p. 20, n. 81, n. 83, n. 85; p. 21, n. 88, n. 90, n. 95; p. 22, n. 97, n. 98, n. 99.

Specifically, Sierra Club devotes three-plus pages to attacking the Companies' discussion of Company witness Rose's capacity, natural gas, and energy price forecasts contained in the Companies' original Reply Brief. Notably, there is single passing reference to Modified Rider RRS at footnote 85 (page 20) and no mention of the Companies' or other intervenors' initial post-rehearing briefs or Rider DMR, i.e., the proper subjects of a post-rehearing reply brief in the context of the limited scope of the hearing on rehearing.[3] Indeed, Sierra Club's misplaced

[3] The Entry dated June 3, 2016, limited the scope of the hearing on rehearing as follows: "The scope of the hearing will be limited to the provisions of, and alternatives to, the Modified RRS Proposal. No further testimony

commentary occurs in a vacuum, essentially as if the hearing on rehearing had never occurred. Sierra Club's tack here amounts to little more than yet another backhanded attempt to re-litigate issues on rehearing that the Commission already has considered and decided. This is improper and therefore this material warrants being stricken.

Sierra Club does nothing more in this portion of its Post-Rehearing Reply Brief than mount a procedurally improper and impermissible attempt at a *de facto* sur-reply to the Companies' original Reply Brief, some seven months after the fact. The Commission rightfully frowns on such untoward procedural gamesmanship. *See, e.g.*, *In the Matter of the Complaint of the City of Reynoldsburg, Ohio*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, *58-59 (April 05, 2011) (striking portions of memorandum in support of motion ostensibly to correct citations subsequent to filing of reply briefs because this material constituted an "impermissible surreply"). *See also*, *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011*, Case No. 11-5843-GA-RDR, 2012 Ohio PUC LEXIS 801 at *7-11 (Oct. 3, 2012) (denying motion for leave to file sur-reply). Following *City of Reynoldsburg*, the Commission should strike Sierra Club's "impermissible surreply" accordingly. *City of Reynoldsburg* at *59.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' motion to strike.

(continued…)

will be allowed regarding other assignments of error raised by parties." Case No. 14-1297-EL-SSO, Entry, p. 4 (June 3, 2016) ("June 3 Entry"). The Commission "affirmed in all respects" the June 3 Entry, including the limited scope of the hearing on rehearing. Case No. 14-1297-EL-SSO, Third Entry on Rehearing, p. 9 (July 6, 2016).

Date: September 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 2nd day of September, 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 parties via electronic mail.

/s/ David A. Kutik
David A. Kutik

Summary: Motion to Strike Portions of Sierra Club's Post-Rehearing Reply Brief electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company