

**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

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**NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S MEMORANDUM CONTRA  
FIRSTENERGY'S MOTIONS TO STRIKE**

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**I. INTRODUCTION**

The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company (collectively, the “Companies”) moved to strike portions of the Northeast Ohio Public Energy Council’s (“NOPEC”) initial brief on rehearing and reply brief on rehearing by motions filed August 29 and September 2, 2016, respectively. The Companies argue that because the attorney examiner struck certain evidence of the forecasted cost of New Rider RRS, the evidence, although properly proffered after the examiner’s oral ruling, “cannot be considered by the Commission.”<sup>1</sup> The Companies are wrong on the law. As importantly, they are wrong on policy. Their argument would set a dangerous precedent by limiting the extent to which the Commission, in crafting its orders, could consider proffered evidence that was improperly excluded from the record by its attorney examiners at hearing.

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<sup>1</sup> See the Companies’ Motion to Strike Portions of NOPEC’s Initial Brief, at 1.

## II. ARGUMENT

**A. Under O.A.C. 4901-1-15(F), the Commission stands in the place of an appellate court in initially reviewing whether an attorney examiner's improper exclusion of evidence, preserved by proffer, affected a party's substantial rights.**

Ohio R. Evid. 103(A)(2)<sup>2</sup> provides that error in a trial court's ruling cannot be predicated upon evidence excluded from trial unless a party's "substantial right" is affected, and the substance of the evidence was made known by proffer to the court. The Companies are correct in their general assertion that, at least in civil court cases, the purpose of a proffer is to "preserve a party's right to appeal an evidentiary ruling excluding it."<sup>3</sup> In other words, because the trial court excluded the evidence, it necessarily cannot consider the evidence excluded in rendering its decision. Rather, the issue is preserved for the appellate process. Significantly, during the appellate process the appeals court must consider the proffered evidence to determine if it affected the party's substantial right.<sup>4</sup>

The Companies' argument that the Commission cannot consider proffered evidence ignores the Commission's different administrative decision-making process. In the administrative process, the Commission does not make the record, but reviews the record made by its attorney examiner, and essentially takes the place of an appellate court in initially reviewing its attorney examiner's procedural errors. The process specifically permits parties

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<sup>2</sup> Ohio R. Evid. 103(A)(2) provides:

(A) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

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(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.

<sup>3</sup> See Companies' Motion to Strike Portions of NOPEC's Initial Brief, at 2.

<sup>4</sup> See, e.g., *State v. Gilmore* (1986), 28 Ohio St.3d 190, 503 N.E.2d 147.

aggrieved by an attorney examiner's ruling to raise the propriety of the ruling on brief for the Commission to consider in crafting its order. See O.A.C. 4901-1-15(F).<sup>5</sup> This process is explicitly recognized in past procedural entries.<sup>6</sup>

**B. NOPEC had the duty to raise on brief, and the Commission has the duty to consider, the proffered evidence to determine whether it affected a party's substantial right. Ohio R. Evid. 103(A)(2) and O.A.C. 4901-1-15(F).**

In its briefs NOPEC argued that the examiner erred by excluding the forecasted cost of New Rider RRS presented by various witnesses. Although the Companies had projected that New Rider RRS would provide a net benefit to customers of \$561 million based upon stale 2014 data, the proffered testimony of updated forecasts shows the onerous costs that New Rider RRS would impose upon customers.<sup>7</sup> Ohio Consumers' Counsel witness Wilson demonstrated that the cost of the New Rider RRS is between approximately \$1.3 *billion* to \$3.5 *billion*.<sup>8</sup> Similarly, P3/EPSCA witness Kalt, relying on recent market energy forwards, testified that customers would lose \$2.7 billion under New Rider RRS,<sup>9</sup> and Sierra Club witness Comings testified that

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<sup>5</sup> O.A.C. 4901-1-15(A)(2) provides:

Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

<sup>6</sup> See, e.g., *In Re Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR (AE Entry, April 25, 1990), paragraph 7, in which the attorney examiner refused to certify an interlocutory appeal in which the Industrial Energy Consumers ("IEC") sought to reverse the examiner's ruling excluding evidence. The entry concludes: "...IEC can proffer its evidence for the Commission's consideration. In the event the Commission determines that the Examiner was in error, the Commission can consider the evidence proffered by IEC."

<sup>7</sup> See NOPEC Initial Brief on Rehearing, at 15-16; NOPEC Reply Brief on Rehearing, at 3.

<sup>8</sup> OCC/NOAC Ex. 1, at 13 (Wilson Rehearing Direct).

<sup>9</sup> P3/EPSCA Ex. 17, at 8 (Kalt Rehearing Direct).

customers' loss would equal nearly \$1.6 billion, using a recent PJM market energy price forecast and an ICF capacity price forecast.<sup>10</sup>

To obtain relief under Ohio R. Evid. 103(A)(2), NOPEC is **required** to include the proffered costs of New Rider RRS in its brief to show that the examiner's ruling affected its customers' "substantial rights." The substantial right at issue is provided by R.C. 4928.143(C)(1), which prohibits the Commission from approving an electric security plan ("ESP") if it is less favorable in the aggregate than the market rate option ("MRO"). As explained in NOPEC's initial brief on rehearing, the improperly excluded evidence shows that the onerous costs of New Rider RRS makes the Companies' proposed ESP up to approximately \$3.5 *billion* less favorable than an MRO, as opposed to the Companies' outdated data which shows that the proposed ESP is approximately \$612 million more favorable.<sup>11</sup> Without question, the ruling affects NOPEC's customers' substantial rights and NOPEC had not only the right, but the obligation, under Ohio R. Evid. 103(A)(2) and O.A.C. 4901-1-15(F) to brief how the examiner's rulings affected the substantial rights of its nearly 500,000 electricity customers in northeastern Ohio. Accordingly, the Companies' motions to strike must be denied.

### **III. CONCLUSION**

For the foregoing reasons, NOPEC respectfully requests that the Companies' motions to strike filed August 29 and September 2, 2016 be denied.

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<sup>10</sup> Sierra Club Ex. 100, at 3 (Comings Rehearing Direct).

<sup>11</sup> NOPEC Initial Brief on Rehearing, at 16.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum Contra was served *via electronic mail* upon the parties of record this 13<sup>th</sup> day of September 2016.



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Summary: Text Northeast Ohio Public Energy Council's Memorandum Contra FirstEnergy's  
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