BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

Suburban Natural Gas Company,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 17-2168-GA-CSS
	)	
Columbia Gas of Ohio, Inc.	)	
	)	
Respondent.	)	

REPLY MEMORANDUM OF COLUMBIA GAS OF OHIO, INC., IN SUPPORT OF MOTION TO STRIKE EXHIBIT A OF THE COMPLAINANT'S REPLY BRIEF

1. Introduction

Suburban Natural Gas Company ("Suburban") begins its Memorandum Contra Motion to Strike by suggesting that Columbia Gas of Ohio, Inc. ("Columbia") is overreacting. Suburban insists its unrequested and unauthorized rebuttal testimony is simply "a proffer of evidence[,] made to preserve an objection[,]" and that it "will not be admitted into the hearing record."[1] Half a sentence later, however, Suburban abandons that pretense and invites the Commission to "consider the rebuttal testimony" for its merits, "notwithstanding [the attorney examiners'] ruling."[2] Suburban goes on to contend the Commission may rely on anything filed in its docket, "regardless of whether it was admitted into the record of the hearing," and encourages the Commission to consider Suburban's unsworn rebuttal testimony as substantive evidence.[3]

Suburban cannot have it both ways – or either way, for that matter. The proper way to make a proffer of Mr. Pemberton's testimony would have been to describe that testimony at hearing, after the attorney examiners rejected Subur-

[1] Suburban Memorandum Contra Motion to Strike at 1.

[2] *Id.*

[3] (Emphasis omitted.) *Id.* at 1, 4, 5 n.4.

ban's request for rebuttal testimony. Suburban did not do that. The proper way to appeal the attorney examiners' ruling would have been to explain, in Suburban's post-hearing briefs, why Suburban believed the ruling was in error. Suburban did not do that either. The alternative process Suburban now proposes to the Commission – allowing Suburban to "proffer" the excluded testimony *after* hearing by filing it as an attachment to Suburban's post-hearing reply brief, and then considering it as substantive evidence – would flout the Commission's rules and precedent while working clear prejudice on Columbia. As explained below, Suburban's "proffered" rebuttal testimony is improper extra-record evidence, and the Commission should strike it.

2. Law and Argument

2.1. The Commission's rules and precedent require the proffering of excluded evidence at hearing, not in post-hearing briefs.

The Commission's rules authorize presiding hearing officers to rule on "objections, procedural motions, and other procedural matters" and "[t]ake such actions as are necessary to * * * [p]revent the presentation of irrelevant or cumulative evidence."[4] The attorney examiners in this proceeding exercised that authority in denying Suburban's request to offer rebuttal testimony.

A party seeking to appeal such a ruling to the Commission must, "*at the time the ruling or order is made*, * * * make[ ] known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection."[5] This is akin to a proffer under Evid. R. 103(A)(2), which states, in relevant part, that "[e]rror may not be predicated upon a ruling which * * * excludes evidence unless * * * the substance of the evidence was made known to the court by offer * * * ." A treatise on courtroom evidence explains that "[a] proffer is simply a statement on the record, outside the hearing of the jury, *summarizing the import* of the offered evidence."[6]

Rule 4901-1-27(D), Evid.R. 103(A), and Commission precedent all make clear that the time to make a proffer of evidence is at hearing. In Suburban's 2011 self-complaint case involving Columbia's DSM program, for example, Suburban unsuccessfully appealed an attorney examiner's ruling excluding a line of ques-

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[4] Ohio Adm. Code 4901-1-27(B)(4), (7)(b).

[5] (Emphasis added.) Ohio Adm. Code 4901-1-27(D).

[6] (Emphasis added.) 1-103 Ohio Evidence Courtroom Manual § 103.1 (2017).

tioning at hearing. In the Entry declining to certify Suburban's application for interlocutory appeal, the attorney examiner noted that Suburban had failed to preserve its arguments regarding the alleged error properly, commenting: "[N]otwithstanding the ruling by the presiding examiner at issue here, nothing prohibited Suburban from making a proffer of evidence * * *, following the ruling. Again, Suburban made no such proffer."[7] And Suburban made no proffer here either. Suburban's counsel was awaiting an "inquiry from the bench about the issues to be addressed in rebuttal" and never offered that information itself; he simply "took exception to [the] ruling " and stated that Suburban "did not have an opportunity to see Columbia's testimony until it was prefiled."[8] As the attorney examiner correctly held in denying certification of Suburban's interlocutory appeal, that ambiguous statement did not put the Commission on notice of the reason Suburban now claims it needs rebuttal testimony.[9]

Suburban contends that filing the rebuttal testimony in post-hearing briefs still preserves the appeal under Evid.R. 103(B), which allows a court excluding evidence to "direct the making of an offer in question and answer form."[10] But Evid.R. 103(B) makes clear that a court *seeking* a proffer "in question and answer form" will direct it "[a]t the time of making the ruling" excluding the evidence.[11] Here, the attorney examiners did not direct Suburban to proffer Mr. Pemberton's rebuttal testimony in question-and-answer form. They simply held that rebuttal testimony would not "help the Commission in their decision in this case."[12]

As discussed in Columbia's Motion to Strike,[13] the Commission has directly prohibited what Suburban is attempting to accomplish here. In a 2016 Entry on Rehearing in Ohio Edison's ESP case, the Commission held that "the appropriate use of a 'proffer' is simply to preserve a party's right to appeal an evidentiary ruling excluding it" and "not * * * an additional opportunity to introduce new evidence into the record without providing parties sufficient opportunity to re-

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[7] *See In re Self Complaint of Suburban Natural Gas Co. Concerning Its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Entry at 5, ¶10 (July 6, 2012).

[8] (Emphasis omitted.) Suburban Memorandum Contra Motion to Strike at 6 n.5.

[9] *See* Entry at ¶22 (May 25, 2018).

[10] Suburban Memorandum Contra Motion to Strike at 2.

[11] Evid.R. 103(B).

[12] Vol. III Tr. at 516.

[13] *See* Columbia Motion to Strike at 3.

spond to it."[14] Suburban attempts to redefine that ruling, contending that Mr. Pemberton's rebuttal testimony "is not 'new' evidence" because it "pertains to an issue introduced by Columbia."[15] But although it is not on a new *topic*, it *is* "new evidence"; as Suburban acknowledges, Mr. Pemberton's rebuttal testimony is "additional evidence" that was not "admitted at hearing."[16] Suburban further contends that Columbia would have had an opportunity to respond to Mr. Pemberton's rebuttal testimony if Columbia had elicited that testimony from Mr. Pemberton at hearing on cross.[17] In other words, Suburban maintains Columbia should have anticipated the content of Mr. Pemberton's rebuttal testimony, almost two months before Suburban inappropriately filed it, and helped Suburban present that testimony at hearing. But Columbia was not responsible for ensuring that Suburban introduced the evidence it wished to rely on. Suburban's reading of *Ohio Edison* inverts the burden of proof and turns the opinion's meaning, and the Commission's procedures, on their heads.

The import of *Ohio Edison* is clear: "new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record * * *."[18] The prejudice to Columbia from what Suburban is attempting to do is also clear. Columbia cannot, at this time, respond to Mr. Pemberton's rebuttal testimony unless the Commission decides to reopen the hearing and allow Suburban to offer that testimony on the record.[19] Such an entry would not be warranted, as the attorney examiners appropriately ruled at hearing that Suburban's rebuttal testimony would not be helpful.[20] But unless and until the Commission issues such an entry, Suburban's rebuttal testimony is extra-record evidence and should be stricken.[21]

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[14] *In re Application of Ohio Edison Co. et al. For Authority to Provide For A Standard Service Offer*, Case No. 14-1297-EL-SSO ("*In re Ohio Edison*"), Fifth Entry on Rehearing, at ¶376 (Oct. 12, 2016).

[15] Suburban Memorandum Contra Motion to Strike at 2.

[16] *Id.* at 5.

[17] *Id.* at 2.

[18] *In re Ohio Edison*, Fifth Entry on Rehearing, at ¶376.

[19] *See* Ohio Adm. Code 4901-1-34 ("The commission * * * may, upon their own motion * * *, reopen a proceeding at any time prior to the issuance of a final order * * * to permit the presentation of additional evidence * * * .").

[20] Vol. III Tr. at 516.

[21] *See In re Fuel Adjustment Clause of Columbus Southern Power Co. and Ohio Power Co. and Related Matters for 2010*, Case Nos. 10-268-EL-FAC *et al.*, Opinion and Order at 8 (May 14, 2014) (granting a motion to strike exhibits attached to a reply brief that "constitute extra-record material").

2.2. The Commission may not consider unsworn rebuttal testimony, filed after hearing, as part of the record of this proceeding.

Suburban further contends that attaching excluded testimony to a post-hearing brief is a proper way for a party to appeal an evidentiary ruling to the full Commission after an unsuccessful interlocutory appeal. The Commission's rules state that the party "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 any * * * appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case."[22] But Suburban did not do that.[23]

Suburban's reply brief did not "discuss" the attorney examiners' ruling excluding its request to offer rebuttal testimony or attempt to rely on that evidence to support any argument. Instead, the reply brief simply said Suburban was proffering the "rebuttal testimony that Suburban * * * should have been allowed to submit, * * * as Exhibit A."[24] To the extent Suburban is asking the Commission to reverse the attorney examiners' ruling, attaching the rebuttal testimony as an exhibit was the wrong way to accomplish that end. The Commission has declined invitations to "review * * * proffered * * * rebuttal testimony to determine that the portions identified * * * constitute proper rebuttal testimony improperly excluded by the Attorney Examiner[,]"[25] and it should do so again here.

In the end, though, Suburban is not asking the Commission to overturn the attorney examiners' ruling so much as to ignore that decision entirely, and "consider Suburban's proffered testimony on the merits * * * ."[26] Suburban asserts, moreover, that any attempt to "strike" that testimony would be futile, because it would still be part of the "record" for any appeal to the Supreme Court of Ohio.[27] This is, again, incorrect. Although the *fact* of the so-called "proffer" will be in the record on appeal, its *substance* will not be. In a 2006 opinion, the Supreme Court of Ohio declined to consider an argument based on three docu-

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[22] (Emphasis added.) Ohio Adm. Code 4901-1-15(F).

[23] *See* Suburban Memorandum Contra Motion to Strike at 2-3.

[24] Suburban Reply Brief at 21.

[25] *In re Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Case No. 96-922-TP-UNC, Opinion and Order, at 24 (Oct. 4, 2001).

[26] Suburban Memorandum Contra Motion to Strike at 5.

[27] *Id.*, citing S.Ct.Prac.R. 15.01(A)(1).

ments not in the evidentiary record below. Two of the documents were "letters [originally] filed * * * as attachments to a * * * witness's direct testimony," which the attorney examiner struck.[28] The third document was a letter attached as an exhibit to an application for rehearing, which the Commission declined to consider "part of the record."[29] The Court agreed with the Commission, noting that although the appellant relied on those documents "as if they were part of the record in this case[,]" they were in fact "not in evidence."[30] For the same reason, if the Commission strikes Suburban's improper rebuttal testimony, it will not be in evidence or part of the record on appeal.

Suburban contends that R.C. 4901.18 allows the Commission to "tak[e] additional evidence[,]" even if the attorney examiners have excluded that evidence.[31] This is true. But the Commission's rules (and due process) do not permit the Commission to take that additional evidence in the form of unsworn testimony attached to a post-hearing brief. Instead, the Commission would need to reopen the hearing, on its own motion, to allow "the presentation of additional evidence * * *."[32] As it stands, Suburban's rebuttal testimony is not in evidence, and thus cannot be treated as part of the record in this case.

3. Conclusion

A party may preserve its objection to an attorney examiner's exclusion of evidence by proffering that evidence at hearing. If a request to certify an interlocutory appeal is unsuccessful, as it was here, the party may appeal the ruling to the full Commission by discussing the issue in a post-hearing brief. And the Commission may, if it chooses, overrule the attorney examiner and reopen the proceeding to allow the introduction of the excluded evidence. This process preserves the introducing party's interests while protecting the opposing party's due process rights and ensuring that the Commission's eventual order is fully supported by record evidence. Suburban, however, attached its excluded rebuttal testimony to its post-hearing reply brief. It then challenged the Commission to ignore the attorney examiners' ruling excluding that evidence and consider the unsworn testimony on its merits. This, the Commission should not do.

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[28] *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶18.

[29] *Id.*

[30] *Id.* at ¶19.

[31] Suburban Memorandum Contra Motion to Strike at 5, quoting R.C. 4901.18.

[32] Ohio Adm. Code 4901-1-34(A).

For the reasons provided above and in Columbia's Motion to Strike, the Commission should strike Exhibit A to the Complainant's Reply Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail on the 26th day of June, 2018, upon the parties listed below:

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Summary: Reply Memorandum in Support of Motion to Strike Exhibit A of Complainant's Reply Brief electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.