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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE REQUEST FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL BY NORTHEAST OHIO PUBLIC ENERGY COUNCIL, NORTHWEST OHIO AGGREGATION COALITION, OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, OHIO PARTNERS FOR AFFORDABLE ENERGY AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The request by Joint Applicants[1] to certify for interlocutory appeal the March 23, 2015 scheduling Entry offers little support and has less (indeed, no) merit. The Joint Applicants want effectively to stay this case until the Commission issues a final Entry on Rehearing for the current electric security plan ("ESP") proceeding brought by Ohio Power Company ("AEP Ohio"), Case No. 13-2385-EL-SSO ("AEP ESP III"). Further, Joint Applicants want the right to file supplemental testimony after supplemental testimony is filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "the Companies").

[1] The Joint Applicants are the Northeast Ohio Public Energy Council ("NOPEC"), the Northwest Ohio Aggregation Coalition ("NOAC"), the Ohio Manufacturers' Association Energy Group ("OMAEG"), the Ohio Partners for Affordable Energy ("OPAE") and the Office of the Ohio Consumers' Counsel ("OCC").

The Request for Certification utterly fails to meet a single requirement for certification of an interlocutory appeal under Rule 4901-1-15(B), O.A.C. Specifically, the March 23 Entry does not: (a) present a new or novel question of interpretation, law, or policy; (b) represent a departure from past precedent; and (c) create the likelihood of undue prejudice befalling any of the Joint Applicants such that an immediate determination by the Commission is necessary. Given its lack of merit, the Request for Certification is nothing more than a ploy to seek delay for delay's sake. Accordingly, the Joint Applicants' Request for Certification should be denied.

II. RELEVANT FACTS AND PROCEDURAL POSTURE

On August 4, 2014, the Companies filed their Application for their fourth electric security plan, Powering Ohio's Progress ("ESP IV"). One component of ESP IV is the Economic Stability Program. Application at 9. As shown in the Companies' Application, the Economic Stability Program "will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term." *Id.* A key feature of this Program is proposed Rider RRS, the mechanism that will act to stabilize retail rates. Rider RRS will distribute credits to or recover charges from retail customers. The credits or charges will arise, in part, from a proposed purchased power transaction between the Companies and FirstEnergy Solutions Corp. ("FES") whereby the Companies would purchase all of the generation output of certain FES generating facilities. Direct Testimony of Jay A. Ruberto at 3 (Aug. 4, 2014). In turn, the Companies would "offer this output into the PJM markets, and net 100% of the revenues against costs, with the differences being passed along to customers through [proposed] Rider RRS." *Id.*

Notably, the proposed purchase power transaction would be a FERC jurisdictional contract and is not under review here. Ruberto Test. at 3. As part of ESP IV, the Companies are

seeking Commission approval of only Rider RRS. Further, contrary to the Joint Applicants' mischaracterization (Request for Cert. at 3), costs recovered under Rider RRS would not be charges to the Companies' customers for generation service; rather, Rider RRS will operate as a purely financial hedge to help protect customers from price increases and volatility over the long term. *See* Application at 9; Supplemental Testimony of Stephen J. Baron at 6-8 (March 2, 2015). *See also, In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of An Electric Security Plan,* Case No. 13-2385-EL-SSO, Opinion and Order at 25 (Feb. 25, 2015); *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 No. 14-841-EL-SSO, Opinion and Order at 44 (April 2, 2015).

On February 25, 2015, the Commission issued its Opinion and Order in *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO ("AEP ESP III Order"). As part of its Application, AEP Ohio sought the approval of a rider to recover costs related to a proposed purchase power agreement between the utility and the Ohio Valley Electric Corporation. As noted in the March 23 Entry, "the Commission declined to adopt the purchase power agreement (PPA) rider proposal as put forth in the AEP ESP III proceeding; however, the Commission authorized the establishment of a placeholder PPA rider, at the initial rate of zero." March 23 Entry at 2. Further, "the Commission also presented several factors it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs." *Id.* Those factors included:

> Financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

Id. (citing AEP ESP III Order at 25). On March 27, 2015, three of the Joint Applicants filed their applications for rehearing in the AEP ESP III proceeding. *See* Case No. 13-2385-EL-SSO, Docket (Mar. 27, 2015).[2]

In response to the AEP ESP III Order, the Attorney Examiner in the instant proceeding modified the procedural schedule for the limited purpose of permitting the parties to file additional testimony and serve additional discovery "regarding the AEP Ohio Order factors." March 23 Entry at 3. To that end, the Attorney Examiner modified the procedural schedule for this proceeding as follows:

- April 13, 2015: Service date for discovery requests regarding the AEP ESP III Order factors.
- May 4, 2015: Due date for supplemental testimony on behalf of the Companies and intervenors regarding the AEP ESP III Order factors.
- May 29, 2015: Due date for testimony on behalf of Staff.[3]
- June 2, 2015: Date for prehearing conference.
- June 15, 2015: Commencement date of hearing.

Id. at 2-3. On March 30, 2015, the Joint Applicants filed their Request for Certification regarding the procedural schedule set forth in the March 23 Entry.

[2] NOPEC and NOAC were not parties to Case No. 13-2385-EL-SSO.

[3] Of note, Staff has yet to file any testimony in this proceeding. On the other hand, the intervenors in the instant matter, including all of the Joint Applicants, have had the opportunity to file direct testimony, supplemental testimony regarding the Stipulation and Recommendation filed on December 22, 2014, and to engage in extensive written discovery and participate in numerous depositions of the Companies' witnesses.

III. STANDARD OF REVIEW

There is no dispute that for Joint Applicants' appeal to move forward, it must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." Rule 4901-1-15(B), O.A.C.[4] In order to succeed on a request for certification of an interlocutory appeal, a movant must satisfy both requirements of Rule 4901-1-15(B):

> The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that:
>
> [1] the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent; and
>
> [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

Rule 4901-1-15(B), O.A.C.

Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g.*, *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677 at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that Entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a*

[4] Pursuant to Rule 4901-1-15(A), O.A.C. an "immediate interlocutory appeal" of an Attorney Examiner's ruling (i.e., without certification) is only permissible in four circumstances; to wit, when that ruling: "(1) [g]rants a motion to compel discovery or denies a motion for a protective order; (2) [d]enies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony; (3) [r]efuses to quash a subpoena; [or] (4) [r]equires the production of documents or testimony over an objection based on privilege." Rule 4901-1-15(A), O.A.C. The March 23 Entry presents none of these types of rulings. Thus, Joint Applicants' appeal must be certified under Rule 4901-1-15(B), O.A.C.

Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619 at *8-10 (June 21, 2012) (same); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT, 2012 Ohio PUC LEXIS 484 at *13-14 (May 18, 2012) (same); *In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI, 2011 Ohio PUC LEXIS 494 at *2-3 (April 20, 2011) (same).

IV. ARGUMENT

The Joint Applicants fail to satisfy either of the requirements set forth in Rule 4901-1-15(B). The Joint Applicants fail to show that the ruling at issue presents a new or novel question of interpretation, law, or policy, or that it departs from past precedent.[5] Further, the Joint Applicants also fail to explain adequately why an immediate determination by the Commission is necessary for them to avoid any supposed undue prejudice. Their Request for Certification should be denied accordingly.

A. The Entry Presents No New Or Novel Question Of Interpretation, Law, or Policy, Or A Departure From Past Precedent.

1. The Entry does <u>not</u> present a departure from past precedent.

"It is well-settled that…the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the

[5] Retail Energy Supply Association, the PJM Power Providers Group, the Electric Power Supply Association, IGS Energy, Direct Energy Services, LLC, Direct Energy Business, LLC, and Direct Energy Marketing, LLC ("Suppliers") filed a "Response" in support of the request to certify an appeal. Sierra Club filed a memorandum purportedly in response to the Supplier's "Request." Neither pleading is proper and both should be stricken. *See In the Matter of the Application of Duke Energy Ohio*, Case No. 14-841-EL-SSO at 9-10 (holding that an intervenor's self-styled "memorandum contra" filed after the due date for seeking an interlocutory appeal had passed was in effect an untimely interlocutory appeal, which was not further considered because "such [] pretense is not appropriate). In any event, neither the Suppliers' Response nor Sierra Club's memorandum even bother to argue that the requirements for certification of an appeal have been met.

orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Weiss v. Pub. Util. Comm.* 90 Ohio St. 3d 15, 18 (2000). *See also, Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560 (1982) (same). "The public utilities commission is invested with discretion as to its order of business, and there is such a wide latitude of that discretion that this court may not lawfully interfere with it, except in extreme cases." *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St. 2d 21, 23 (1979) (quoting *State ex. rel. Columbia Gas & Fuel Co. v. Pub. Util. Comm*., 122 Ohio St. 473, 475 (1930)).

No rule or statute precludes the Commission from ordering that testimony from intervenors and an applicant (such as a utility) be filed on the same day, especially when that testimony is limited to a specific topic or issue. Such an order is well within the Commission's inherent discretion to manage its proceedings as it sees fit. For instance, *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, 2012 Ohio PUC LEXIS 452 (May 9, 2012) ("*Duke's EE Rider* "), the utility filed an application seeking authorization of an energy efficiency/peak demand reduction rider. Subsequent to the hearing, the Commission "reopened the record…to consider what criteria we should utilize for evaluating the appropriateness of the incentive mechanism for performance of energy efficiency programs proposed in [the utility's] application." *Id.* at *7. The Commission ordered that the parties provide additional testimony on a specific set of issues related to the energy efficiency inventive mechanism at issue. *See id.* at *7-8. Notably, the Commission required that expert testimony from the utility, Staff and intervenors all be filed on the same day. *See id.* at *9.

Duke's EE Rider is not an isolated decision. Indeed, in a variety of contexts, the Commission has ordered utilities, intervenors, and on occasion Staff, to file testimony on the same day. *See e.g., In the Matter of the Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 14-2078-GA-RDR, 2015 Ohio PUC LEXIS 186, Entry at *2 (Mar. 5, 2015) (requiring Staff, applicant and intervenors to file testimony on same day related to requested adjustments to a specific rider for the recovery of infrastructure improvement costs); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates to Recover Costs Incurred in 2014*, Case No. 14-2051-GA-RDR, 2015 Ohio PUC LEXIS 184, Entry at *2 (Mar. 4, 2015) (ordering Staff, applicant and intervenors to file expert testimony on same day regarding adjustments to a pipeline replacement rider after an initial period in which all parties could file comments related to the need for the proposed adjustments); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Case No. 14-2134-GA-RDR, 2015 Ohio PUC LEXIS 180, Entry at *3 (Mar. 3, 2015) (requiring all parties to file testimony on the same day regarding proposed cost recovery under a pipeline replacement rider after parties were free to file initial comments related to the utility's application); *In the Matter of the Petition of CSX Transportation, Inc. to Close to Vehicular Traffic the Bloomingrove/New Winchester Road Grade Crossing (DOT No. 262042J), Located in Washington Township, Morrow County, Ohio*, Case No. 14-379-RR-UNC, 2015 Ohio PUC LEXIS 99, Entry at *3 (Feb. 2, 2015) (requiring expert testimony addressing the need, or lack thereof, of the proposed closure of a rail crossing to be filed on the same day by all parties); *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support Its Standard Service Offer*, Case No. 12-

3254-EL-UNC, Entry at 5 (requiring testimony addressing auction pricing, retail rates and a proposed auction schedule to be filed on same day by applicant-utility and intervenors); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-3549-EL-SSO, 2011 Ohio PUC LEXIS 1151, Entry at *2 (Oct. 25, 2011) (canceling prior procedural schedule and requiring testimony from all parties regarding a proposed stipulation be filed on the same day); *In the Matter of the Application of The Dayton Power and Light Company To Establish a Fuel Rider*, Case No. 09-1012-EL-FAC, 2011 Ohio PUC LEXIS 1088, Entry at *2 (Oct. 4, 2011) (ordering testimony addressing an annual fuel cost filing to be filed on the same day by all parties); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services,* Case No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 671, Entry at *2-3 (June 1, 2011) (requiring testimony relating to a standard choice offer structured auction to procure natural gas supplies to be filed on the same day by intervenors, Staff and the applicant-utility); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of the Establishment of Rider BTR and Associated Tariff Approval*, Case No. 11-2641-EL-RDR, 2011 Ohio PUC LEXIS 503, Entry at *5 (April 28, 2011) (ordering testimony regarding a proposed stipulation to be filed on the same day by all parties).

Here, the Joint Applicants baldly claim that the March 23 Entry "departs from past precedent by requiring Intervenors to submit testimony on the AEP Ohio PPA [*sic*] at the same time as FirstEnergy [*sic*] is required to file testimony." Request for Cert. at 6. The Joint Applicants then merely cite to three other ESP proceedings – Case No. 13-2385-EL-SSO (AEP Ohio's current ESP proceeding), Case No. 14-841-EL-SSO (Duke's current ESP proceeding),

and Case No. 12-1230-EL-SSO (the Companies' prior ESP proceeding) – in which the Commission authorized the filing of intervenor testimony regarding, *e.g.*, a stipulation, after the applicant (the utility) filed its testimony. *See* Request for Cert. at 6. But those proceedings hardly set any hard and fast rule about the proper scheduling of testimony. Instead, in those proceedings, the Attorney Examiners, pursuant to *Weiss*, *Toledo Coalition* and *Sanders Transfer*, acted well within their discretion in setting the due dates for testimony as they determined were most appropriate.

In any event, as the Commission precedent cited above makes clear, the Attorney Examiner here acted equally within his discretion, and by no means departed from past precedent, when he required that the Companies and intervenors' testimony regarding the AEP ESP III Order factors be filed on the same day. This is especially the case where, as here, the topic to be addressed by such testimony is limited and narrowly focused. *See, e.g., Duke's EE Rider* at *7-8; *Application of Columbia Gas* at *2; *Duke SSO Proceeding* at *2. Thus, because the March 23 Entry does not represent a departure from past precedent, the Joint Applicants' Request for Certification falls short and should be denied.

2. The Entry does <u>not</u> present a new or novel question of interpretation, law, or policy.

As noted, the Commission is vested with broad discretion to manage the procedural aspects of its proceedings as it sees fit. *See*, *Weiss* at 18; *Toledo Coalition* at 560; *Sanders Transfer* at 23. In line with that discretion, the Commission may, from time to time, ask for parties to its proceedings to provide additional pre-filed testimony, conduct additional discovery, or engage in additional briefing, all of which is typically tailored to a specific topic. Doing so merely assists the Commission by providing it with a more fulsome record and by no means "presents a new or novel question of interpretation, law, or policy."

Duke's EE Rider again proves instructive. As noted, in that Entry, the Commission re-opened proceedings so that all parties to the matter could file additional testimony on a limited set of issues related to energy efficiency incentive mechanisms. *See Duke's EE Rider* at *8. Specifically, that testimony was limited to revenues that could be earned via the proposed incentive mechanism, incentives related to statutory benchmarks, return on investment in infrastructure, and the utility's significantly excessive earning threshold. *See id.* The due date for such testimony was the same for all parties. *See id.* at *9. *See also, In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, 2013 Ohio PUC LEXIS 3, Opinion and Order at *5-6 (Jan. 9, 2013) (ordering additional briefing concerning specific issues related to a solar generation project); *In re Complaint of Ron Mosley v. The Dayton Power and Light Company*, Case No. 11-1494-EL-CSS, 2013 Ohio PUC LEXIS 148, Entry at *2 July 10, 2013) (allowing for additional discovery related to customer billing); *In re Complaint of Ohio Direct Communications, Inc. v. ALLTEL Ohio, Inc. and the Western Reserve Telephone Company*, Case No. 95-819-TP-CSS, 1996 Ohio PUC LEXIS 86, *3 (Order of February 14, 1996) (permitting all parties to file supplemental briefing to address whether the recently passed Telecommunications Act of 1996 contained provisions which impacted the Commission's potential decision); *In the Matter of the Application of GTE North Incorporated for Authority to Adjust Its Rates and Charges and to Change Its Tariffs*, Case No. 87-1307-TP-AIR; 85-1969-TP-COI, 1988 Ohio PUC LEXIS 1215, Entry at *22-23 (Dec. 28, 1988) (requiring a party to submit a supplemental brief regarding conditions for a stay at the Commission).

Joint Applicants also argue that the March 23 Entry "sets forth a novel interpretation of law and policy – issuing a procedural schedule directing parties to address an interceding

decision and treating a non-final order as a final order without regard for the rehearing process" that is presently underway in AEP ESP III. Request for Cert. at 5. This claim is wrong for at least two reasons.

First, the March 23 Entry merely authorizes the parties, should they so choose, to submit additional testimony and to engage in additional discovery limited to the factors set forth in the AEP ESP III Order. *See* March 23 Entry at 3. Given the complexity of the issues in this case, the Attorney Examiner has exercised his procedural discretion and sought additional information. The March 23 Entry is narrowly focused, strictly limiting as it does additional testimony and discovery to a consideration of the extent to which the AEP ESP III Order factors may (or may not) be applicable here. As such, the March 23 Entry is on all fours with the well-settled Commission precedent discussed above. *See, e.g.*, *Duke's EE Rider* at *8; *Ohio Power Company* at *5-6; *Ohio Direct* at *3.

Second, the March 23 Entry in no way "treats the AEP Ohio Order (and the PPA factors) as conclusive." Request for Cert. at 2. Far from it. The March 23 Entry does not in any way indicate whether or how the Commission may (or may not) apply the AEP ESP III Order factors to the instant matter. Indeed, the AEP ESP III Order itself explicitly states that the AEP ESP III Order factors do not bind the Commission; these factors are thus better understood as a guide, not a stricture. *See* AEP ESP III Order at 25; March 23 Entry at 2. Hence, the Joint Applicants' claim that the March 23 Entry represents a new or novel question of interpretation, law or policy has no basis in law or fact.

B. An Immediate Determination By The Commission Is Not Necessary To Prevent The Likelihood Of Undue Prejudice.

The Joint Applicants claim that they will suffer undue prejudice if the instant proceeding is allowed to go forward prior to the issuance of a final entry on rehearing in AEP's current ESP

proceeding. *See* Request for Cert. at 7-9. Further, the Joint Applicants claim that requiring intervenors and the Companies to file testimony limited to the AEP ESP III Order factors on the same day will also prejudice them. *See id.* at 9-10. Joint Applicants are wrong on both counts. In fact, when viewed critically, the Request for Certification is simply an improper request to delay these proceedings for the sake of delay.

1. The pendency of the applications for rehearing in AEP ESP III will not prejudice any party to this case.

Joint Applicants make much of the fact that three of them have applications for rehearing pending in the AEP ESP III proceeding. *See* Request for Cert. at 7. By their Request for Certification, the Joint Applicants seek a *de facto* stay of the instant proceeding until the Commission has "substantively ruled" on all of the applications for rehearing that are pending in the AEP ESP matter. Request for Cert. at 9. As the Joint Applicants themselves admit, this process could take a considerable amount of time, *see id*, perhaps as much as several months. And no doubt, after the Commission has relied on the applications for rehearing, Joint Applicants will come back and request a delay until all appeals have been exhausted. Left begging is the question: all to what end?

To be sure, both this case and AEP ESP III present some similar issues. After all, both cases involve ESP applications. But there is no precedent of which the Companies are aware where the Commission stayed its hand simply because different utilities have raised similar issues in rate cases, ESP cases or any other proceeding involving a company's application. Indeed, if Joint Applicants' view was correct, this case should be stayed because both this case and AEP ESP III involve interpretations and applications of the "ESP v. MRO test," or riders that collect distribution capital costs or transmission costs, among a host of other common issues.

Given the timing overlap of different companies' cases and the pendency of numerous appeals of these cases, under Joint Applicants' logic, an ESP case pending now might never be decided.

Joint Applicants also fail to make any case that the disposition of the issues that they raise in their applications for rehearing will have any bearing on this case. For example, in their AEP ESP III application for rehearing, the Joint Applicants variously claim that the proposed AEP PPA Rider: (1) is allegedly preempted by Federal law; (2) conflicts with Section 4928.02(H) insofar as it allegedly amounts to an anti-competitive subsidy; and (3) allegedly fails to meet the requirements of Section 4928.143(B)(2)(d). *See* Case No. 13-2385-EL-SSO, Application for Rehearing by the Office of the Ohio Consumers' Counsel at 3-14; 19-27; and 35-39 (Mar. 27, 2015); Case No. 13-2385-EL-SSO, Application for Rehearing and Memorandum in Support of the Ohio Manufacturers' Energy Group at 4-9 Mar. 27, 2015); Case No. 13-2385-EL-SSO, Application for Rehearing of Ohio Partners for Affordable Energy and the Appalachian Peace and Justice Network at 7-12; 14-17; 17-20 (Mar. 27, 2015).

The merit of each of these arguments, however, rises and falls on the specifics of each case. For example, the Commission's determination with respect to whether any rider is permitted under Section 4928.143(B)(2)(d) depends on the specific facts and evidentiary record regarding that rider. Thus, should the Commission determine that AEP Ohio did not show that AEP Ohio's PPA Rider qualified under that statute, that factual determination would be based on the showing (or lack of showing) that AEP Ohio made regarding that rider. Regardless of whether AEP Ohio fails to prove its case, the Companies must be given the opportunity to prove theirs. Simply put, a factual determination by the Commission on issues relating to the availability of certain riders under the ESP statute in AEP ESP III should not be determinative of any issues in this case.

The error of Joint Applicants' logic is on full display regarding their preemption argument. According to Joint Applicants, AEP ESP III presents the Commission with a decision to "approve" a PPA between AEP Ohio and another party, *i.e.*, a wholesale transaction. Request for Cert. at 5. Here, however, no PPA is being presented for approval; no wholesale prices are being established by anything that the Commission is being asked to approve. Thus, no preemption issues arise here.

In addition, Joint Applicants' arguments overlook the fact that there is nothing to prevent them from putting on whatever evidence they think is necessary to advance whatever arguments they think are relevant here. In fact, even a cursory review of the testimony filed by intervenors in this case already shows that many witnesses intend to advance various arguments regarding the lawfulness or propriety of Rider RRS. Given the opportunity that the parties (and Joint Applicants in particular) have had – and will have -- to make their record regarding the arguments that they claim to be so concerned, Joint Applicants will not be prejudiced in any way by having this case move forward.

Joint Applicants also contend that resolution of AEP Ohio ESP III is necessary so that the Commission and the parties can know what factors should be applied here. Request for Cert. at 8. This is nonsense. As noted, the AEP ESP III Order specifically provided that the factors listed there would not necessarily be binding on the Commission's future determination. If the Commission subsequently determines, either in AEP ESP III or here, that certain factors should not apply, the Commission can simply not consider such evidence here. As to other additional factors suggested now by Joint Applicants in their rehearing applications, Joint Applicants never say why, if such factors were indeed important, these parties did not already file testimony on those subjects when they previously had the opportunity to do so.

2. Requiring the filing of supplemental testimony simultaneously prejudices no one.

The Joint Applicants also claim that the March 23 Entry unduly prejudices them because it requires supplemental testimony from the Intervenors and the Companies to be filed on the same day. *See* Request for Cert. at 9. The Joint Applicants contend that "they must be afforded an opportunity to file testimony responsive to FirstEnergy's supplemental testimony" because "permitting First Energy to provide additional testimony to address the factors detailed in the AEP Ohio ESP case is tantamount to permitting FirstEnergy to amend its application." *Id.* This too is wrong. There are at least three reasons why.

First, it is difficult to see how the March 23 Entry threatens to prejudice the Joint Applicants simply because the Entry requires them to share a due date for testimony with the Companies. The Joint Applicants have received responses to literally hundreds if not thousands of interrogatories and document requests. Further, the Joint Applicants have had the opportunity to participate in and review numerous depositions of the Companies' witnesses. Thus, the Joint Applicants have had access to a voluminous amount of information regarding ESP IV. Given this access and given that the issues are by now well known to all of the parties, much of the information that could be included in the Companies' Supplemental Testimony should not be news to anyone. Joint Applicants never suggest that they think that they will be surprised by the Companies' filing. At best, any argument that there is some need for any intervenor to respond to what the Companies have filed is premature. Joint Applicants should at least be required to show why an additional stage of testimony – and the associated delay caused thereby -- is necessary.

Second, the March 23 Entry requesting additional testimony and allowing for additional discovery was the result of a *sua sponte* decision by the Commission. It was in no way initiated

or requested by the Companies. Thus, the Companies and the Joint Applicants are on an equal footing regarding the applicability, if any, of the AEP ESP III Order factors to this proceeding. As such, it makes sense for the Companies and the Joint Intervenors to file testimony, should they choose to do so at all, on the same day. As noted, on prior occasions the Commission has required that applicants, such as utilities, and intervenors file testimony on the same day, particularly when that testimony, as here, addresses a specific and limited set of issues. *See, e.g., Duke EE Rider* at *7-9 (requiring testimony regarding energy efficiency incentive mechanisms to be filed on the same day by both applicant-utility and intervenors); *In the Matter of the Application of Duke Energy Ohio,* 2011 Ohio PUC LEXIS 503, Entry at *5 (ordering testimony regarding a stipulation to be filed on the same day by all parties).

Third, the Joint Applicants claim that they should have an opportunity to respond because the Companies have the right of rebuttal misses the mark. The short answer is: so what? Generally, under Ohio law, a party that bears the burden of proof in a proceeding is the party that is afforded the opportunity to present rebuttal evidence, *i.e.*, to have, as it were, the proverbial "last word." *See, e.g., In re Medure*, 2002-Ohio-5035, ¶47 (Ohio Ct. App., Columbiana County Sept. 18, 2002) (holding that party with the" initial burden of proof" was entitled to the "last word"); *Ferguson v. Dyer*, 149 Ohio App. 3d 380, 389 (Ohio Ct. App., Franklin County 2002) (holding that trial court was correct in permitting party to whom the burden of proof had shifted (as provided by statute) to have the "'last word', in the form of a surrebuttal"). Here, the Companies, and not the Joint Applicants, bear the burden of proof. *See* R.C. 4928.143(C)(1) ("The burden of proof in the proceeding shall be on the electric distribution utility.") Thus, it is unclear on what legal basis, if any, the Joint Applicants can plausibly claim that the March 23

Entry deprives them of any putative entitlement to rebut any supplemental testimony which the Companies may choose to file.

Notably, the other parties filing in support of a staggered schedule for filing supplemental testimony (i.e., the Suppliers or Sierra Club) offer virtually no basis for changing the March 23 Entry's procedural schedule. At most, they vaguely and erroneously indicate that a staggered filing schedule will provide "a more organized record" (Suppliers' Response at 3) or "more focused testimony" (Sierra Club's Memo. at 3). They never say how the record will be "more organized" or their testimony will be "more focused" under Suppliers' preferred schedule.

Of course, Suppliers give themselves away with their recommended schedule; a schedule that would greatly compress the time that the Companies would have to take depositions regarding intervenors' supplemental testimony. Given that the Companies could be forced to respond to testimony from potentially more than fifty parties, the only thing that the Suppliers appear to want is to prejudice the Companies. Such gamesmanship should not be rewarded.

There is no need for any change to the schedule set forth in the March 23 Entry. Notwithstanding opposition from the Companies, the hearing date has already been continued a number of times in this proceeding and doing so yet again based upon the erroneous concerns expressed in the interlocutory appeal and elsewhere would be inappropriate. Indeed, pushing the hearing date back any further will seriously undermine the ability of the Companies to conduct their planned October 2015 auction to secure the necessary standard service offer supply commencing on June 1, 2016.

V. CONCLUSION

For the foregoing reasons, Joint Applicants' Request for Certification should be denied.

Date: April 6, 2015

Respectfully submitted,

/s/ David A. Kutik

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: dunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216)579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on April 6, 2015.

/s/ David A. Kutik
David A. Kutik

cmooney@ohiopartners.org
drinebolt@ohiopartners.org
tdougherty@theoec.org
joseph.clark@directenergy.com
ghull@eckertseamans.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
mkurtz@BKLlawfirm.com
kboehm@BLKlawfirm.com
jkylercohn@BKLlawfirm.com
larry.sauer@occ.ohio.gov
Michael.schuler@occ.ohio.gov
joliker@igsenergy.com
mswhite@igsenergy.com
myurick@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
tobrien@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
callwein@wamenergylaw.com
jfinnigan@edf.org
wttpmlc@aol.com
mkl@bbrslaw.com
gas@bbrslaw.com
ojk@bbrslaw.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
meissnerjoseph@yahoo.com
trhayslaw@gmail.com
lesliekovacik@toledo.oh.gov
Cynthia.brady@exeloncorp.com
David.fein@exeloncorp.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
athompson@taftlaw.com
Marilyn@wflawfirm.com
Blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
glpetrucci@vorys.com
ccunningham@akronohio.gov
bojko@carpenterlipps.com
Allison@carpenterlipps.com
hussey@carpenterlipps.com
gkrassen@bricker.com
dborchers@bricker.com
mkimbrough@keglerbrown.com
mfleisher@elpc.org
jscheaf@mcdonaldhopkins.com
mitch.dutton@fpl.com
matt@matthewcoxlaw.com
todonnell@dickinson-wright.com
dwolff@crowell.com
rlehfeldt@crowell.com
Jeffrey.mayes@monitoringanalytics.com
toddm@wamenergylaw.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
mhpetricoff@vorys.com
Thomas.mcnamee@puc.state.oh.us
Ryan.orourke@puc.state.oh.us
sfisk@earthjustice.org
msoules@earthjustice.org
tony.mendoza@sierraclub.org
Lael.campbell@exeloncorp.com
dstinson@bricker.com

Summary: Memorandum Contra Joint Applicants' Request for Certification of an Interlocutory Appeal electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company