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

MEMORANDUM CONTRA OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MOTION TO STRIKE

I. INTRODUCTION

On August 4, 2014, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (the Companies) filed an application to establish a standard service offer (SSO), in the form of a fourth electric security plan (ESP IV), to provide generation service pricing for the period June 1, 2016 through May 31, 2019, later modified to an eight-year term beginning June 1, 2016 through May 31, 2024. A hearing on the ESP proposed in the application commenced on August 31, 2015. Since the initial filing of ESP IV, the Companies have filed four stipulations, which collectively present a new ESP, which the Companies have termed "Stipulated ESP IV."

On February 26, 2016, the Companies filed a Motion to Strike portions of OMAEG's initial brief, including portions of the brief that referenced two pieces of testimony of Ms. Leila Vespoli,[1] and portions of the brief that referenced the testimony of Dr. Hill regarding the Consumer Protection Association (CPA).[2]

OMAEG hereby files this memorandum contra. The Companies' request to limit valuable information that should be provided to the Commission, as it relates to relevant testimony that was made by an executive of FirstEnergy Corp. and as it relates to one of the signatory parties to the Stipulated ESP IV, should be denied. The Companies' tactics to threaten the full development of the record and equitable resolution of factual issues by excluding testimony that is at the core of the issues in this proceeding are telling. Notably, the Companies rely on technical legal arguments (some of which have already been denied several times[3]) in their continual attempts to limit the admission of these pieces of testimony into the record.

[1] See Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Motion to Strike Portions of the Initial Brief of the Ohio Manufacturers' Association Energy Group at 4-7.
[2] Id. at 2-4.
[3] Tr. Vol. XXV at 5035-36; Tr. Vol. XXV at 5107; Tr. Vol. XXVII at 5491.

With respect to Ms. Vespoli's testimony, the Companies' Motion to Strike is yet another attempt to appeal appropriate rulings by the Attorney Examiners, which the Companies already argued at the evidentiary hearing and in their interlocutory appeal, filed on October 13, 2015. The Companies' latest attempt to limit this testimony is in no way a proper appeal of the ruling and circumvents the procedural requirements established in the Ohio Administrative Code. Additionally, as it relates to Dr. Hill's testimony regarding the CPA, OMAEG recognizes that testimony was excluded from the record by the Attorney Examiners and properly raised that issue in its initial brief as it is authorized to do so pursuant to Rule 4901-1-15, Ohio Administrative Code (O.A.C.). The Commission's procedural rules specifically afford OMAEG this opportunity and OMAEG appropriately availed itself of that opportunity. Therefore, the Companies' Motion to Strike should be denied.

II. ARGUMENT

1. The Companies' Motion to Strike OMAEG's Brief that Relies on Two Pieces of Testimony given by Ms. Vespoli is Improper in Form and Substance.

a. Background

OMAEG witness Dr. Edward Hill filed his Second Supplemental Testimony on August 10, 2015 in accordance with the Attorney Examiners' established requirements and procedural schedule. Attached to Dr. Hill's Second Supplemental Testimony was EWH Supplemental Attachment A, which included testimony of Ms. Vespoli, who at the time of the relevant testimony was Executive Vice President and General Counsel of FirstEnergy Corp., before the Senate Public Utilities Committee of the Ohio Senate on April 9, 2013.

During the proceeding, the Companies orally moved to strike the portion of Dr. Hill's Supplemental Attachment A to Dr. Hill's Second Supplemental Testimony containing Ms. Vespoli's testimony before the Senate Public Utilities Commission. The Attorney Examiners

properly denied the motion to strike, finding the testimony of Ms. Vespoli relevant to the issues in the hearing and proper evidence.[4]

Similarly, Interstate Gas Supply, Inc. (IGS) witness Matthew White filed Supplemental Testimony on March 2, 2015 in accordance with the Attorney Examiners' established requirements and procedural schedule. Attached to Mr. White's Supplemental Testimony as MW Ex. 1 was testimony of Ms. Vespoli, who at the time of the relevant testimony was Executive Vice President and General Counsel of FirstEnergy Corp.[5] Ms. Vespoli provided the testimony to the House Public Utilities Committee of the Ohio House of Representatives on October 19, 2011.

The Companies orally moved to strike the portion of Mr. White's Supplemental Testimony referencing MW Ex. 1, as well as Ms. Vespoli's testimony attached as MW Ex. 1. The Attorney Examiners properly denied the motion to strike, finding the testimony of Ms. Vespoli relevant to the issues in the hearing and proper evidence.[6] The Companies' again objected to the admittance of Dr. Hill's Supplemental Testimony, including Attachment A, after the cross-examination of Dr. Hill had concluded. Over the objections of the Companies, including objections as to relevance and authentication, the Attorney Examiners found the testimony of Ms. Vespoli relevant and admitted the document into evidence as proper.[7]

The Companies filed a request for certification and application for review of an interlocutory appeal of the Attorney Examiners' rulings on October 13, 2015,[8] to which OMAEG

[4] Tr. Vol. XXVII at 5491.
[5] IGS Ex. 13, Attachment MW Ex.1.
[6] Tr. Vol. XXV at 5035-36.
[7] Tr. Vol. XXV at 5107.

[8] See Companies Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiners' Oral Rulings and Memorandum in Support (October 13, 2015) and Supplement to Companies' Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiners' Oral Rulings (October 15, 2015).

replied October 19, 2015.[9] The Companies have now filed a Motion to Strike portions of OMAEG's initial brief, which properly referenced Ms. Vespoli's testimonies as attachments to exhibits, all of which were admitted into the record as evidence in this proceeding.

b. The Companies' Motion to Strike is an Improper Avenue for Challenging the Attorney Examiners' Rulings Regarding Two Pieces of Testimony by Ms. Vespoli.

Rule 4901-1-15, O.A.C., which governs interlocutory appeals, provides that an "immediate interlocutory appeal to the commission" may be taken of a ruling in one of four circumstances involving a ruling that:

> (1) Grants a motion to compel discovery or denied a motion for protective order;
> (2) Denies a motion to intervene, terminated a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony;
> (3) Refuses to quash a subpoena; or
> (4) Requires the production of documents or testimony over an objection based on privilege.[10]

Absent one of the aforementioned rulings, an interlocutory appeal may proceed only after certification, which requires demonstration of two criteria. Specifically, as instructed by the Commission, 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 the parties, should the commission ultimately reverse the ruling in question.[11]

[9] Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Request For Certification and Application For Review of an Interlocutory Appeal of the Attorney Examiners' Oral Rulings (October 19, 2015).

[10] Rule 4901-1-15(A) (1)-(4), O.A.C.

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

> If the request for certification does not meet both of these requirements, the request should be denied.[12]

As Rules 4901-1-15(A) and (B), O.A.C., provide, parties have an opportunity to take an interlocutory appeal of a procedural ruling by the Attorney Examiner only after certification, which requires a demonstration of the two criteria provided in Rule 4901-1-15(B), O.A.C. The Companies availed themselves of this opportunity and filed an interlocutory appeal on October 13, 2015.[13] Although the Companies have not yet been successful on their interlocutory appeal certification request, the Companies should not be afforded another chance to challenge the same Attorney Examiner rulings through a motion to strike.

Both pieces of testimony by Ms. Vespoli have been admitted into evidence as Attachment A to Dr. Hill's Second Supplemental Testimony (OMAEG Ex. 19) and MW Ex. 1 attached to Mr. White's Supplemental Testimony (IGS Ex. 13) by the Attorney Examiners and all parties to the proceeding have the right to rely on the record evidence and reference it in their briefs to the Commission. Otherwise, no party would be able to ever rely on any piece of evidence that was objected to during the course of the hearing, including the Companies. This would be an untenable result. Thus, the Companies' Motion to Strike is an improper appeal

[12] See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan,* Case No. 08-920-EL-SSO, *et.al.,* Entry at 7 (October 1, 2008) ("[i]n order to certify an interlocutory appeal to the Commission, both requirements must be met"); *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, Entry at 7 (May 18, 2012); *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, Entry at 5 (June 21, 2012); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2013 Grid Modernization Costs,* Case No. 14-1051-GE-RDR, Entry at 7 (February 5, 2015).

[13] See Companies' Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiners' Oral Rulings and Memorandum in Support (October 13, 2015) and Supplement to Companies' Request for Certification and Application for Review of an Interlocutory Appeal of the Attorney Examiners' Oral Rulings (October 15, 2015).

mechanism for oral rulings issued by the Attorney Examiners during the course of the hearing and should be denied.

Nonetheless, if the Commission is considering the substance of the Companies' Motion to Strike, OMAEG hereby incorporates by reference the totality of OMAEG's arguments contained in its memorandum contra the Companies' request for certification and review of an interlocutory appeal, addressing the Companies' substantive arguments on the alleged technical errors associated with the admission of both pieces of testimony provided by Ms. Vespoli.[14] OMAEG also briefly addresses these arguments below.

c. Each Piece of Ms. Vespoli's Testimony is not Hearsay and is an Admission by a Party-Opponent.

The Ohio Rules of Evidence prohibit the admission of evidence that is hearsay unless the evidence is otherwise admissible by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly, by the rules of evidence, or by other rules prescribed by the Supreme Court of Ohio.[15] Ohio R. Evid. 801(D)-(2) provides that a statement is <u>not hearsay</u> if:

> The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

[14] IGS also filed a Reply to the Companies' interlocutory appeal on October 19, 2015. IGS' arguments address the appropriateness of the admission of Mr. White's testimony and the attached exhibit (MW Ex. 1). IGS explains that the Companies' alleged technical legal argument should be rejected and the Attorney Examiners' rulings were proper (IGS Reply at 1).

[15] Ohio R. Evid. 802.

At the time of the relevant testimony, Ms. Vespoli was a representative and agent of the Companies in her role as the Executive Vice President and General Counsel of FirstEnergy Corp. She provided her testimony before the Senate Public Utilities Committee within the scope of her employment on April 9, 2013 and before the House Public Utilities Committee on October 19, 2011. Both pieces of her testimony clearly satisfy parts (a) and (c) of Ohio R. Evid. 201(D)(2) as admissions by a party-opponent. Ms. Vespoli was acting as a representative and agent for the Companies when she testified in support of competitive markets, stated her opposition to generation subsidies, and explained the Companies' position on energy issues in the State of Ohio. Presumably, Ms. Vespoli was authorized to give her testimony on behalf of the Companies and it was within the scope of her employment. She implied such through each piece of testimony:

1) As the largest electric distribution service provider in the state, FirstEnergy's Ohio utilities serve more than two million customers across the northern tier of the state, as well as in portions of central Ohio. We also have a competitive business, FirstEnergy Solutions, which owns and operates power plants, and supplies retail generation service to more than two and a half million electric customers in Ohio and five other states.[16]

2) I'm Leila Vespoli, Executive Vice President and General Counsel of FirstEnergy, which is the parent company of three electric distribution utilities in Ohio—Ohio Edison, The Illuminating Company and Toledo Edison—and of our competitive subsidiary, FirstEnergy Solutions.

   I'm pleased to be here today to talk about what Ohio has done right in creating an effective structure for providing customers with lower prices for electric generation, and where we can do more to maintain and expand competitive markets for electricity in the years ahead.[17]

[16] See Attachment A at page 85 of 93 to Dr. Hill's Second Supplemental Testimony (also cited as page 2 of Vespoli's testimony before the Senate Public Utilities Committee (April 9, 2013)) (OMAEG Ex. 19).

[17] See MW Ex. 1 at 2 to Mr. White's Supplemental Testimony (IGS Ex. 13).

It is also fair to assume that Ms. Vespoli was speaking truthfully regarding the Companies' positions on such matters when providing her testimony. Therefore, her testimony also satisfies parts (b) and (d) of Ohio R. Evid. 201(D)(2) and is not hearsay.

d. Each Piece of Ms. Vespoli's Testimony was Properly Authenticated when Admitted as Evidence in the Record.

Notably, the Companies do not challenge or dispute the validity of both pieces of testimony submitted by Ms. Vespoli. Instead, the Companies raise a technical legal argument to claim that the documents were not properly authenticated. Ohio R. Evid. 901 states that authentication or identification of a document is a condition precedent to the *admissibility* of the document as evidence. Specifically, the rule provides that authentication or identification is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims."[18] Additionally, as acknowledged by the Companies, some evidence is self-authenticating and does not require additional extrinsic evidence to provide its identification or authenticity.[19]

Specific to public records, Ohio R. Evid. 1005 permits the contents of a document authorized to be recorded or filed and actually recorded or filed to be proved by copy, certified in accordance with Ohio R. Evid. 902 or "testified to be correct by a witness who has compared it with the original."[20] Further, the rule states that if a copy complying with the aforementioned certification, "cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."[21]

[18] Ohio R. Evid. 901(A).

[19] See Companies Motion to Strike at 6.

[20] Ohio R. Evid. 1005.

[21] Id.

The Attorney Examiners' rulings at issue in this case relate to two pieces of testimony of Ms. Vespoli as Executive Vice President and General Counsel of FirstEnergy Corp. Both pieces of testimony were provided to the Ohio legislature: one was provided to the Senate Public Utilities Committee, a committee within the public office of the Ohio Senate, on April 9, 2013; the other was provided to the House Public Utilities Committee, a committee within the public office of the Ohio House of Representatives. Both testimonies are public records. Both pieces of Ms. Vespoli's testimony were included as attachments to intervenor witnesses' testimony and were filed at the Commission in accordance with the Commission's rules.

While OMAEG believes both pieces of Ms. Vespoli's testimony are self-authenticating as public records under Ohio R. Evid. 902(4), OMAEG exercised reasonable diligence in attempting to obtain a certified copy of Ms. Vespoli's testimony that OMAEG's witness included with his testimony from both the Ohio Historical Society and the Ohio Senate Clerk's office in order to provide further evidence of its authenticity if deemed necessary by the Attorney Examiners. OMAEG was informed by the Ohio Historical Society that the office ***does*** stamp legislative records to indicate they are true and authentic copies; however, they had not yet received the Ohio Senate records from April 2013. OMAEG subsequently spoke with the Deputy Legal Counsel at the Ohio Senate, who stated that the Ohio Senate does not certify records for these purposes and the position of the Ohio Senate is that the documents are self-authenticating. OMAEG produced an affidavit attesting to these conversations and the position of the Ohio Senate that the legislative testimony of Ms. Vespoli was self-authenticating, and provided email correspondence from the Deputy Legal Counsel at the Ohio Senate, providing the originally submitted testimony to the Senate.[22] The affidavit was brought to the hearing by Dr.

[22] See attached affidavit and email from the Ohio Senate Deputy Legal Counsel's office marked as Attachment A.

Hill to provide further evidence that the document attached to Dr. Hill's testimony was a true and accurate copy of the original document and the witness to the affidavit was also present at the hearing in the event the Companies wished to question that witness. This clearly satisfies the "reasonable diligence" standard required by Rule 1005.

Further, to the extent necessary, the additional authentication of Ms. Vespoli's testimony was completed prior to the admission of Dr. Hill's Second Supplemental testimony and attachments into the evidentiary record. As noted by the Companies, Ohio R. Evid. 901(A) requires that authentication or identification of a document is a "condition precedent" to admissibility. Regardless of whether the attached testimony of Ms. Vespoli was self-authenticating, the affidavit attesting to its authentication and the witness to the affidavit were both provided and available for the Companies' review and questioning at the proceeding and *prior to* the evidence being admitted into the record.

To the extent necessary, IGS also provided testimony and documentation to achieve authentication of the piece of testimony by Ms. Vespoli attached to IGS witness' testimony. IGS also obtained certified copies of the Ms. Vespoli testimony from the Ohio General Assembly via the Legislative Service Commission.[23] IGS' Reply to the Companies' interlocutory appeal explains in detail the additional efforts that IGS underwent in this regard.[24]

The documents provided by the intervening parties with regard to Ms. Vespoli's testimony serve only to aid in the certification and authentication of the public documents as part of the intervenors' direct testimony at the evidentiary hearing. Contrary to the Companies'

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[23] IGS Reply at 8.

[24] IGS Reply at 4-9.

arguments,[25] the intervenors were merely doing their due diligence to respond to anticipated evidentiary objections.

Although the Companies claim that the Attorney Examiners' rulings were contrary to prior Commission precedent,[26] the Companies fail to mention that there were also many instances where the Attorney Examiners denied motions to strike and admitted evidence over objections by parties.[27] Moreover, both pieces of Ms. Vespoli's testimony is distinguishable from the examples cited by the Companies because her testimonies are on behalf of the Companies, are public records, are self-authenticating, and *were* appropriately verified (and further authenticated) prior to being admitted into the record.

As required by Ohio R. Evid. 901, the Attorney Examiners took into consideration all of the documentation and witness testimony provided during the hearing and made a determination that the documents had been identified, authenticated, and thus, capable of being admitted into the record when the Attorney Examiners admitted the witnesses' testimony and the attachments as evidence.[28] Accordingly, both of Ms. Vespoli's testimonies were properly authenticated and the Attorney Examiners' rulings to admit the testimony as evidence in the record over objections were proper.

[25] Motion to Strike at 7.

[26] Motion to Strike at 6-7.

[27] See, e.g., Tr. Vol. XIX at 3690: 11-15 where the Attorney Examiners' denied a motion to strike two exhibits submitted by the Companies stating: "We believe the Commission needs the full record of or regarding the final Clean Power Plan and this information had been beneficial in their ultimate decision in the proceeding."

[28] Tr. Vol. XXV at 5035-36; Tr. Vol. XXV at 5107; Tr. Vol. XXVII at 5491.

e. The Companies have failed to show any prejudice from the Attorney Examiner's rulings.

The Companies have failed to provide any evidence demonstrating that they have in fact suffered or will suffer undue prejudice or expense due to the Attorney Examiners' rulings. OMAEG and IGS provided the Companies with copies of the witness testimony, with Ms. Vespoli's testimony attached, when the testimony was filed in accordance with the filing requirements established by Rule 4901-1-29, O.A.C. This rule states:

> (A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered.
> (B) Notwithstanding paragraph (A) of this rule, the presiding hearing officer may, in his or her discretion, permit an expert witness to present additional oral testimony at the hearing, provided that: such testimony could not, with reasonable diligence, have been filed and served within the time limits established by the commission or the presiding hearing officer or the presentation of such testimony will not unduly delay the proceeding or unjustly prejudice any other party.

Both pieces of Ms. Vespoli's testimony were filed in the case with the witness testimony months prior to the hearing, were provided at the hearing and marked as evidence as Attachment A to OMAEG Ex. 19 and MW Ex. 1 attached to IGS Ex. 13, were moved into evidence, and admitted into evidence over the numerous objections of the Companies. The Companies sustained no "unfair surprise" from this information and were not prejudiced.

The concerns raised by the Companies on this issue are not prejudicial. The Companies will have to spend no additional resources in responding to the testimony of the intervening witnesses (which include the testimony of Ms. Vespoli) and the parties' briefs. The Companies had the opportunity to cross examine Dr. Hill and Mr. White regarding all of their attachments, including Ms. Vespoli's testimony, and had the opportunity to articulate their concerns with the

public document and its contents in their post-hearing brief, as well as any intervenors' references thereto. Contrary to the Companies' claims, it would be prejudicial to the intervenors, as well as the Commission, if the public testimony of a Senior Executive of FirstEnergy Corp. was ***not*** admitted in the record given the critical information contained in the testimony and its relevancy to the current proceeding. This relevancy was acknowledged in the Attorney Examiners' ruling.[29]

Both witnesses utilized Ms. Vespoli's testimony to explain that the Companies took public positions in 2011 and 2013 that directly contradict their application and filings in this proceeding. Ms. Vespoli discussed in her testimony in April 2013 before the Senate Public Utilities Committee many issues that are relevant to the case pending before the Commission: whether the Companies' projections and forecasts are accurate;[30] whether "[customers] may determine that the long-term payback [of a program] may not justify the up-front costs";[31] whether the proposed stipulations adopting certain energy efficiency programs are cost-effective;[32] whether customers should be required to pay for certain energy efficiency programs that benefit others;[33] whether the proposal will have a direct effect on competing businesses;[34]

[29] Tr. Vol. XXV 5035-36; Tr. Vol. XXVII at 5491.

[30] Ms. Vespoli states that "[e]lectric demand remains flat, and wholesale power prices are at their lowest levels in 10 years. But the game changer is the new generation supply option. A gas plat fired by shale gas – an abundant resource that we didn't really know existed five years ago." See Attachment A at page 84 of 93 to Dr. Hill's Second Supplemental Testimony at 3-4 (April 9, 2013) (OMAEG Ex. 19).). She also states that "there is no load growth projected in any Ohio utility service territory between 2007 and 2020." Id. at 5.

[31] Id. at 7.

[32] Vespoli argues against "costly programs that discourage electric load growth despite low power prices and adequate generation supply." Id. at 5.

[33] Vespoli states that many businesses are being required to invest in programs that benefit certain stakeholders, which "amounts to an entitlement program that shifts costs from one group of businesses to another." Id. at 7.

[34] Id.

and whether businesses and consumers should be permitted to make their own decisions regarding how to meet specific energy needs.[35] In concluding her testimony, Ms. Vespoli states:

> Ultimately, businesses and consumers should be allowed to make their own decision on how to meet their specific energy needs. We cannot afford arbitrary and overly prescriptive requirements that raise electricity prices.[36]

In her 2011 testimony, she discussed how competitive markets are working and that subsidizing certain generating facilities and not others create obstacles to investment in generation and increase prices for consumers.[37]

The issues discussed by Ms. Vespoli in both pieces of testimony are directly related to the current proceedings and specifically address the issues pending before the Commission (e.g., whether customers should be required to pay costs associated with subsidizing unregulated affiliate generating units through a Retail Rate Stability Rider.) As the Attorney Examiners' recognized, relevancy is a critical factor in reviewing the reasonableness and appropriateness of the admission of the attachments attached to Dr. Hill's testimony and provided on October 13, 2015 as direct expert testimony in the evidentiary hearing.[38]

[35] Id. at 1-7.

[36] Id. at 7.

[37] MW Ex. 1 at 2, 4-5 to Mr. White's Supplemental Testimony (IGS Ex. 13).

[38] Tr. Vol. XXV at 5036:3-7; Tr. Vol. XXVII at 5491: 3-22.

2. The Commission Should Deny the Companies' Request to Strike An Appeal of the Attorney Examiner's Ruling Regarding a Signatory Party that is No Longer in Existence.

a. OMAEG Properly Raised the Propriety of the Attorney Examiner's Ruling as a Distinct Issue in its Brief.

On January 20, 2016, the Companies cross-examined OMAEG witness Hill regarding his testimony on the Companies' Stipulated ESP IV concerning the Commission's three-part test for evaluation stipulations and the reasonableness of the Stipulated ESP IV in light of the criteria.[39] During the re-direct examination of Dr. Hill concerning questions raised on cross examination about the signatory parties and whether the Stipulated ESP IV satisfied the first prong of the three-part test, the Companies moved to strike portions of Dr. Hill's testimony in which he discussed the CPA, a signatory party to the Stipulated ESP IV.[40] The Attorney Examiners' granted the motion to strike, determining that the information was beyond the scope of the cross examination.[41] OMAEG objected to this ruling on the record during the hearing.

In accordance with Rule 4901-1-15, O.A.C., OMAEG raised the propriety of the Attorney Examiners' oral ruling to strike a portion of Dr. Hill's testimony in its brief filed on February 16, 2016. Specifically, provision (F) provides the following:

> 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.[42]

[39] Tr. Vol. XXXIX at 8343.

[40] Tr. Vol. XXXIX at 8388-8391.

[41] Id. at 8393.

[42] O.A.C. 4901-1-15(F)

In its Motion to Strike, the Companies argue that OMAEG failed to raise the Attorney Examiners' ruling as a distinct issues required by the rule.[43] This argument is wholly inaccurate. In OMAEG's brief, it included a distinct subsection titled: "One of the Signatory Parties ceases to be a functioning or operating entity, and therefore, cannot be a knowledgeable, capable party."[44] This subsection of the initial brief explains in great detail OMAEG's reasons why the Attorney Examiners' ruling was improper. OMAEG properly cited to Rule 4901-1-15(F), O.A.C., and explained its' right to raise the propriety of that ruling in its brief.[45] The fact that OMAEG discusses the first prong of the three-part stipulation test to explain why the questioning was not beyond the scope of cross examination, and thus was proper, in no way prevents OMAEG from meeting the statutory requirement of raising a distinct issue. Rather, this serves to further explain OMAEG's position – that the testimony presented by Dr. Hill was within the scope of cross examination given it relates to the first prong of the stipulation test and therefore should be permitted in the record in order to provide the Commission with complete information to make a decision regarding the reasonableness of the Stipulated ESP IV.

In its Motion to Strike, the Companies' cite to *In the Matter of FAF, Inc. Notice of Apparent Violation and Intent to Assess Forfeiture,* in which the Commission rejected efforts of parties to include information in a brief that was not part of the record.[46] However, in that case, the opposing party sought to utilize a post-hearing affidavit that was not admitted into the record in its brief.[47] Here, OMAEG uses its initial brief to raise the issue of the Attorney Examiners' ruling regarding the exclusion of a specific portion of Dr. Hill's testimony. This is not an

[43] Companies Motion to Strike at 3.

[44] OMAEG's Initial Brief at 71.

[45] OMAEG's Initial Brief at 71-74.

[46] Companies Motion to Strike at 2; See, *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to assess Forfeiture,* PUCO Case No. 06-786-TR-CVF, 2006 WL 3932766 (2006).

[47] Id. at 1.

"improper second chance" as characterized by the Companies,[48] but rather an appropriate way to challenge a procedural ruling issued by the Attorney Examiners per the Commission's rules.

b. Dr. Hill's Testimony Was Not Beyond the Scope of Cross Examination.

As explained in its brief, OMAEG disagrees with the Attorney Examiners' ruling that Dr. Hill's testimony regarding the CPA was beyond the scope of cross examination. The Companies' very first question to Dr. Hill at the hearing on January 20, 2016 referred to the concept of the redistribution coalition,[49] which Dr. Hill has used numerous times to refer to the small group of signatory parties that use political and regulatory processes to generate mutual financial benefits.[50] The Companies then questioned Dr. Hill at length regarding the "diversity of membership" of the signatory parties.[51] In fact, the Companies asked several pointed questions about a number of specific signatory parties, including COSE,[52] the City of Akron,[53] and Staff,[54] and whether those signatory parties, in Dr. Hill's opinion, represented a diverse class of customers. On re-direct examination, OMAEG asked the following question to Dr. Hill:

> Q: With regard to the signatory parties and the diversity of the class, have you learned anything about the signatory parties that would affect your position on what diverse means in the context of the signatory parties and redistributive coalition?[55]

Neither this question, nor Dr. Hill's response, were beyond the scope of the Companies' cross examination. First, if the Companies truly believed it did not ask Dr. Hill about the concept of

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[48] Companies Motion to Strike at 2.

[49] Tr. Vol. XXXIX at 8343.

[50] OMAEG Ex. 18 at 14 (Hill Supplemental).

[51] Companies counsel Mr. Alexander states "Dr. Hill, I want you to focus your attention right now on your point on diversity of membership. That's the topic I would like to stay on right now." See Tr. Vol. XXXIX at 8351.

[52] Tr. Vol. XXXIX at 8349-8350.

[53] Id. at 8354-8357

[54] Id. at 8357.

[55] Id. at 8388.

the signatory parties representing a diversity of interests,[56] it should have objected to the question when it was asked, rather than wait until it heard an unfavorable response. Second, the Companies' assertion that they did not specifically ask about the CPA bears no weight given a number of the Companies' questions referred to the general topic of diversity of interests, which includes *all* signatory parties. Dr. Hill's testimony directly relates to what interest, if any, the CPA represents given the uncertainty surrounding its operational and functional existence.[57]

Thus, Dr. Hill's testimony was within the scope of cross examination and should remain in the record. Raising the propriety of that ruling and discussing why the Attorney Examiner's ruling was in error in OMAEG's brief was proper and consistent with Rule 4901-1-15(F), O.A.C.

Not allowing Dr. Hill's testimony into the record is unfair, unjust, and prejudicial to the opposing parties. On the other hand, allowing a complete record for the Commission to consider, including full information related to the CPA as a signatory party to the Stipulated ESP IV, does not prejudice the Companies.

It is imperative that the Commission receive a full and accurate record in this proceeding in order to determine whether the Stipulated ESP IV is reasonable and a product of serious bargaining among capable, knowledgeable parties. Information regarding whether one of the entities that the Companies have touted as a signatory party to the Stipulated ESP IV who represents low-income customers, is still operating and functioning is not only relevant, but essential in determining whether the signatory parties to the Stipulated ESP IV represent a

[56] Id. at 8391.

[57] Specifically, Dr. Hill states "So the question is, the Consumer Protection Association still may exist as a legal entity, but as a direct service organization representing low-income households, the fact that it's being subject to a federal investigation leads me to really wonder what group it's currently representing." See Tr. Vol. XXXIX at 8369.

diverse group of broad-based interests. It also raises questions regarding the validity and credibility of all the signatures and the Stipulated ESP IV as a whole. As noted by witness Hill, the CPA no longer exists and is currently under investigation for fraud.[58] This knowledge is absolutely necessary for all parties in this proceeding to make informed decisions regarding the reasonableness of the terms of the Stipulated ESP IV, which includes a provision that provides funding to the CPA. Notably, neither the Companies nor CPA's counsel informed the Commission of their change in operational status, removed the CPA from the stipulations as a signatory party, or revised the Stipulated ESP IV specific to the monies flowing to the invalid entity. Not permitting Dr. Hill's testimony regarding such an important factor in this proceeding is misleading to the record provided to the Commission for its review and gravely prejudices the opposing parties to this proceeding.

OMAEG correctly explained the importance of the information stricken from the record in its brief. OMAEG also correctly explained why the ruling was in error. OMAEG's inclusion of its challenge to the oral ruling at hearing was proper and consistent with Rule 4901-1-15(F), O.A.C. Therefore, the specific section in its brief discussing the appealable ruling cannot be stricken from OMAEG's brief as the issue is now pending appeal before the Commission so that the full Commission may rule upon the propriety of the Attorney Examiners' oral ruling as provided for in the Commission's rules.

III. CONCLUSION

In connection with the arguments set forth above, OMAEG respectfully requests that the Commission deny the Companies' Motion to Strike portions of OMAEG's brief related to the testimony of Dr. Hill regarding the CPA and the testimony of Leila Vespoli.

[58] Tr. Vol. XXXIX at 8389.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on March 14, 2016.

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Summary: Memorandum Contra Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company's Motion To Strike electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group