**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Power Company to Revise Reliability Performance Standards Pursuant to O.A.C. 4901:1-10-10(B)(7). | )))) | Case No. 20-1111-EL-ESS |

**MEMORANDUM CONTRA AEP’S MOTION FOR A PROTECTIVE ORDER**

**BY**

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September 19, 2022 (willing to accept service by e-mail)

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# I. Introduction

Tens of thousands of AEP-Ohio residential consumers and their families and businesses lost power during the week of June 12, 2022, in dangerously high heat and humidity. The outages *reportedly* occurred through a combination of grid/transmission failures, storms, and AEP’s own use of shut offs to avoid a greater system failure.[[1]](#footnote-2) But nearly three months later, *Ohioans still do not have a public investigation of the reasons for the outages, if anything could have been done to prevent them, or how they can be prevented in the future.* What we *do* know is that the lives of AEP consumers and their families in central Ohio were especially disrupted and placed at risk. People understandably are upset and deserve answers to important questions surrounding these events.

 As a result, we have served consumer protection discovery about the June 2022 outages in this case where the PUCO will set 2022 reliability standards. Contrary to AEP’s assertions, the discovery is limited in scope, seeks information that is relevant or reasonably calculated to lead to the discovery of admissible evidence, and is guaranteed to us by law,[[2]](#footnote-3) rule,[[3]](#footnote-4) and Supreme Court of Ohio precedent.[[4]](#footnote-5) In consumers’ interest, AEP’s Motion for Protective Order should be denied.

# II. Standard Governing OCC’s Consumer Protection Discovery and AEP’s Effort To Prevent OCC’s Fact-Finding

AEP has moved for a protective order asking the PUCO to prevent OCC from its consumer protection fact-finding.[[5]](#footnote-6) Under O.A.C. 4901-1-24, a protective order should not be granted unless, as AEP acknowledges, it is “*necessary*”[[6]](#footnote-7) to protect a party or person from “annoyance, embarrassment, oppression, or undue burden or expense.” AEP asserts that a protective order is warranted because certain of our consumer protection discovery is not limited in time or scope;[[7]](#footnote-8) it is irrelevant in its entirety and only seeks to annoy, oppress, and burden;[[8]](#footnote-9) and certain of it relates to irrelevant transmission matters.[[9]](#footnote-10)

AEP’s assertions should be considered in light of the broad discovery to which parties are entitled immediately. O.A.C. 4901-1-17(A) provides that discovery may begin “immediately” after a proceeding is commenced. The PUCO has adopted rules that specifically define the scope of discovery. O.A.C. 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The PUCO’s rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.[[10]](#footnote-11) This scope of discovery also applies to requests for production. Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under O.A.C. 4901-1-20. OCC’s right to discovery is assured by law, rule, and Supreme Court of Ohio precedent.[[11]](#footnote-12)

OCC is entitled to timely and complete responses to its consumer protection discovery.

# III. Recommendations

## A. Contrary to AEP’s assertions, OCC’s consumer protection discovery is limited in time and scope and is not overly broad or burdensome.

AEP’s assertion that OCC’s consumer protection discovery is not limited in time or scope is wrong.[[12]](#footnote-13) The assertion cannot and should not serve as a basis for its Motion for Protective Order.

First, the very first discovery request (Interrogatory No. 5-001) begins with “[r]egarding the July 13, 2022 presentation that AEP Ohio provided to the PUCO, . . .”[[13]](#footnote-14) There can be no doubt that the “July 13, 2022 presentation” refers to the presentation that AEP gave to the PUCO about the June 2022 outages – as AEP knows.[[14]](#footnote-15) AEP conveniently omits this request from its Motion for Protective Order.

Each subsequent discovery requests clearly relates to matters raised in that presentation.[[15]](#footnote-16) The PUCO has been very clear that its rules on discovery “do not create an additional field of combat to delay trials or to appropriate the Commission’s time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”[[16]](#footnote-17) With its unfounded and unreasonable reading of OCC’s consumer protection discovery, AEP is simply creating an additional field of combat contrary to law.[[17]](#footnote-18)

Second, OCC’s counsel did not believe that any clarification was necessary regarding the time and scope of its consumer protection discovery. But in the spirit of cooperation (as called for by the discovery rules), OCC’s counsel confirmed for AEP’s counsel (at AEP’s counsel’s request) that the consumer protection discovery was aimed at the June 2022 outages (as AEP acknowledges).[[18]](#footnote-19) Such confirmation (although not necessary, given the above) can leave no doubt about the time and scope of OCC’s consumer protection discovery.

Based on the face of OCC’s consumer protection discovery, and OCC’s confirmation regarding its time and scope, AEP cannot base its Motion for Protective Order on the assertion that the consumer protection discovery is unlimited in time and scope. Its Motion for Protective Order should be denied.

## B. Contrary to AEP’s assertion, OCC’s consumer protection discovery is relevant and reasonably calculated to lead to the discovery of admissible evidence.

AEP asserts that OCC’s consumer protection discovery about the June 2022 outages “is far beyond the scope of this two-year-old distribution reliability metrics case and not relevant or reasonably calculated to lead to the discovery of admissible evidence.”[[19]](#footnote-20) AEP says that its Application and Amended Application “employ a fairly standardized process of establishing new SAIFI and CAIDI metrics – primarily looking at prior years’ non-major event performance.”[[20]](#footnote-21) Because the June 2022 outages occurred after the Amended Application, and would have been excluded from the analysis as a “major event” anyway, AEP concludes that OCC is not entitled to its consumer protection discovery.[[21]](#footnote-22) Otherwise, it would incur undue burden and expense.[[22]](#footnote-23) AEP is wrong.

The reliability standards that are proposed in this case specifically involve establishing AEP’s 2022 reliability standards and beyond.[[23]](#footnote-24) The June 2022 outages occurred during the very year that the proposed standards are intended to be in effect. While the specific circumstances and the impact that the June 2022 outages will have on reliability performance in 2022 are still unknown, the magnitude of the impact must be evaluated to determine the reasonableness of the proposed standards.

AEP asserts that damage to both distribution and transmission facilities led to the widespread June 2022 outages.[[24]](#footnote-25) AEP is responsible for the inspection, maintenance, repair, and replacement of transmission and distribution system facilities in the normal course of providing safe and reliable service to consumers.[[25]](#footnote-26) Establishing reliability standards in this case is very much dependent upon AEP adhering to well-established written programs, policies, procedures, and schedules for the inspection, maintenance, repair, and replacement of transmission and distribution equipment.[[26]](#footnote-27) The June 2022 outages may result in changes in those programs, policies, procedures, and schedules that can impact both the reliability standards in 2022 and annual performance.

Further, no one can be certain at this stage if the 2017-2021 historical analysis to which AEP refers in establishing baseline performance adequately captures the events of June 2022.[[27]](#footnote-28) Historical exclusion of certain outages and the determination of “major events” may be the same or different than the June 2022 outages. Establishing standards and reviewing reliability performance requires analysis of different types and magnitudes of outage events. Additionally, establishing reliability standards requires considering consumer perceptions (including surveys) that evaluate consumer satisfaction.[[28]](#footnote-29) There can be no doubt that the magnitude of the forced outages during the June 2022 event had a major impact on consumer perceptions that should influence the 2022 standards. Further, consumers are paying dearly through single issue rate-making in AEP electric security plans for infrastructure modernization that is supposed to improve AEP’s reliability.[[29]](#footnote-30) Yet the impact on reliability of the investments in AEP’s gridSMART, distribution investment charges, and tree trimming charges have yet to be determined in light of the June 2022 outages.

The consumer protection discovery sought by OCC all relates to AEP’s own presentation that it gave to the PUCO on July 13 about the June 2022 outages. There can be no undue burden and expense to AEP, as it asserts, for producing (relevant) information to OCC that relates to and underlies a presentation that it itself gave to the PUCO. This is especially true to the extent (as AEP asserts) the PUCO is “actively conducting a review of these events with the full cooperation of AEP and AEP Ohio.”[[30]](#footnote-31) Any “active review” by the PUCO would certainly include the same information requests made by OCC and, to the extent AEP *is* cooperating with that review, it is producing the requested information anyway.

OCC’s consumer protection discovery is relevant and reasonably calculated to lead to the discovery of admissible evidence. It will not result in AEP incurring undue burden or expense. AEP’s Motion for Protective Order should be denied.

## C. Contrary to AEP’s assertions, OCC’s consumer protection discovery about transmission infrastructure is not irrelevant.

AEP asserts that its Motion for Protective Order should be granted on OCC’s “transmission-related requests because they are not at all germane to this matter that relates to AEP Ohio’s *distribution* performance metrics.”[[31]](#footnote-32) AEP is wrong.

It is a truism that distribution and transmission are interrelated. One doesn’t happen without the other. AEP itself appears to concede as much, saying that the events of June 2022 “caused damages to AEP Ohio’s distribution facilities as well as AEP transmission facilities, . . .”[[32]](#footnote-33) The potential impact that the June 2022 outages will have on the 2022 reliability performance standards must be evaluated with all available information to fully understand the relationship between different outage events involving both AEP distribution and transmission facilities.

OCC’s consumer protection discovery is relevant and reasonably calculated to lead to the discovery of admissible evidence.

# IV. Conclusion

*People need utility services to live.* During June 2022, people using AEP’s utility service had it fail on them. They deserve answers. OCC, on consumers’ behalf, is seeking answers in the very case where 2022 reliability standards are being established. It is entitled to have them. AEP’s Motion for Protective Order should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 19th day of August 2022.

 */s/ William J. Michael*

 William J. Michael

 Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. *See, e.g*., AEP Ohio The Wire, “Columbus Area Power Outages + FAQs;” <https://www.aepohiowire.com/columbus-area-power-outages-faqs/>. [↑](#footnote-ref-2)
2. R.C. 4903.082. [↑](#footnote-ref-3)
3. Ohio Admin. Code 4901-1-17(A); O.A.C. 4901-1-16(B). [↑](#footnote-ref-4)
4. *OCC v. PUC*, 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-5)
5. *See* AEP’s Motion for Protective Order. [↑](#footnote-ref-6)
6. *Id.* at 5 (italics added). [↑](#footnote-ref-7)
7. *Id.* at 6-8. [↑](#footnote-ref-8)
8. *Id.* at 8-9. [↑](#footnote-ref-9)
9. *Id.* at 9-10. [↑](#footnote-ref-10)
10. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300 (2006), citing to *Moskovitz v. Mt. Sinai Med. Ctr*., 69 Ohio St.3d 638, 661 (1994) and *Disciplinary Counsel v. O’Neill* (1996), 75 Ohio St.3d 1479 (1996). [↑](#footnote-ref-11)
11. *OCC v. PUC*, 111 Ohio St.3d 300 (2006). [↑](#footnote-ref-12)
12. *See* AEP’s Motion at 6-8. [↑](#footnote-ref-13)
13. *See id.* at Attachment 1. [↑](#footnote-ref-14)
14. *See, e.g., id.* at 4, n. 5. [↑](#footnote-ref-15)
15. *See id.* at Attachment 1. [↑](#footnote-ref-16)
16. *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987) (citation omitted). [↑](#footnote-ref-17)
17. If AEP did have any credible question regarding the time and scope of OCC’s consumer protection discovery, it could have asserted an appropriate objection and answered (rather than refusing to answer and filing its Motion for Protective Order). That would have been consistent with the standards governing discovery in PUCO proceedings. [↑](#footnote-ref-18)
18. AEP’s Motion at 7. [↑](#footnote-ref-19)
19. *Id.* at 8. [↑](#footnote-ref-20)
20. *Id.*  [↑](#footnote-ref-21)
21. *Id.* at 8-9. [↑](#footnote-ref-22)
22. *Id.* at 9. [↑](#footnote-ref-23)
23. Amended Application at 13. [↑](#footnote-ref-24)
24. AEP Motion at 3. [↑](#footnote-ref-25)
25. O.A.C. 4901:1-10-27. [↑](#footnote-ref-26)
26. *Id.* at (E)(1). [↑](#footnote-ref-27)
27. AEP Motion at 3. [↑](#footnote-ref-28)
28. Ohio Adm. Code 4901:1-10-10(B)(4)(b). [↑](#footnote-ref-29)
29. R.C. 4928.143(B)(2)(h). [↑](#footnote-ref-30)
30. *Id.* at 4. [↑](#footnote-ref-31)
31. *Id.* at 9-10 (italics in original). [↑](#footnote-ref-32)
32. *Id.* at 3. [↑](#footnote-ref-33)