

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	)	
Power Purchase Agreement Rider	)	Case No. 18-1004-EL-RDR
of Ohio Power Company for 2018.	)	

In the Matter of the Review of the	)	
Power Purchase Agreement Rider	)	Case No. 18-1759-EL-RDR
of Ohio Power Company for 2019.	)	

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**MOTION OF OHIO POWER COMPANY FOR PROTECTIVE ORDER**

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Pursuant to Ohio Adm.Code 4901-1-12 and 4901-1-24(A)(3), Ohio Power Company (“AEP Ohio” or the “Company”) respectfully moves the Public Utilities Commission of Ohio (“Commission”) to issue a protective order providing that the Company need not produce witnesses and documents responsive to the Notice to Take Depositions and Requests for Production of Documents served by The Office of the Ohio Consumers’ Counsel (“OCC”) on January 7, 2021. Instead, AEP Ohio proposes to answer OCC’s questions informally or in writing. The reasons supporting this motion are provided in the attached Memorandum in Support and the attached affidavit of Steven T. Nourse.

Respectfully submitted,

/s/ Steven T. Nourse

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## MEMORANDUM IN SUPPORT

### **I. Introduction**

Approximately one year ago, the Commission directed Staff to issue a request for proposal for an auditor to audit AEP Ohio's PPA Rider for 2018 and 2019. *See* Entry at ¶ 7 (Jan. 15, 2020). OCC moved to intervene in this proceeding that June. Approximately three months later, London Economics International LLC ("LEI") released its *Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company* ("Audit Report"), which found that "Overall, \* \* \* the processes, procedures, and oversight were mostly adequate and consistent with good utility practice \* \* \* ." (Audit Report at 9.) And approximately three months after that, the Commission established the procedural schedule for this proceeding.

The Commission did not schedule a hearing. Instead, the Commission set comment deadlines – January 22, 2021, for the initial comments in response to LEI's Audit Report, and February 12, 2021, for the reply comments. *See* December 7, 2020 Entry at ¶ 8. Because there is no hearing, AEP Ohio will not be presenting witnesses to testify in this proceeding.

On January 7, 2021, counsel for AEP Ohio spoke with the most recent addition to OCC's counsel team, John Finnigan. (*See* Nourse Affidavit ¶ 3.) On that call, Mr. Nourse offered to answer informally any questions Mr. Finnigan and OCC might have about the subject of this proceeding. (*See id.* ¶ 4.) And even though it is not clear that the Company has an obligation to conduct discovery in this case, Mr. Nourse also voluntarily offered to answer any written discovery requests from OCC in an expedited manner, so that OCC would receive AEP Ohio's responses before the comment deadline. (*See id.* ¶ 5.) In a similar vein, Mr. Nourse offered to coordinate with OVEC personnel to conduct an informal video conference to discuss OCC's questions. (*See id.* ¶ 6.) Mr. Finnigan replied that he would take AEP Ohio's reasonable suggestions under consideration and notify the Company of its response. (*See id.* ¶ 7.)

Mr. Nourse's cooperative efforts to meet OCC's discovery needs were unsuccessful. Rather than responding to AEP Ohio's offer, Mr. Finnigan served and filed OCC's Notice to Take Depositions and Requests for Production of Documents within an hour of the conversation. (*See id.* ¶ 8 and Exhibit to Affidavit.) When OCC served it on AEP Ohio on January 7, 2021 – almost seven months after it moved to intervene, four months after the release of the Audit Report, but only 15 days before the comment deadline – it directed AEP Ohio to produce one or more witnesses for a deposition to begin on January 13, 2021 (or another agreed upon date) on four topics, three of which relate to the FirstEnergy Solutions bankruptcy. (*See* Notice to Take Depositions and Requests for Production of Documents by The Office of the Ohio Consumers' Counsel at 1-2 (Jan. 7, 2021).) The discovery requests also directed the deponents to produce five categories of documents “two hours prior to the deposition \* \* \* .” (*Id.* at 2.)

AEP Ohio asks that the Commission grant an order protecting it from the undue burden of responding to OCC's untimely notice of deposition and requests for production of documents. As discussed below, however, AEP Ohio remains willing to respond to informal discovery requests, and to respond to a reasonable number of written interrogatories in an expedited fashion, so that OCC may obtain answers to its questions before the comment deadline. Alternatively, the Commission could direct OCC to participate in the comment process then request any additional hearing or procedure if the comment process is deemed inadequate or unsatisfactory.

## **II. Law and Argument**

The Commission's procedural rules are intended “to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.” Ohio Adm.Code 4901-1-16(A). Consistent with that intent, the Commission generally permits discovery to begin “immediately after a

proceeding is commenced” and directs that it “should be completed as expeditiously as possible.” Ohio Adm.Code 4901-1-17(A). OCC disregarded this directive.

OCC sought intervention, and has been participating, in these proceedings since June 2020. During that time, OCC has propounded four sets of written discovery regarding the issues in this case, including those that are the subject of OCC’s deposition notice, to which the Company has responded fully. There have been no discovery disputes and OCC has not claimed that the Company failed to provide adequate information or responses to OCC’s discovery questions. OCC waited almost a full year after the Commission ordered the audit of AEP Ohio’s PPA Rider to issue its Notice of Deposition. And rather than seeking to complete its discovery expeditiously, OCC selected the discovery method that would take the most time to prepare for and complete – depositions – for a proceeding in which no hearing is presently scheduled or contemplated. OCC’s present deposition notice – served more than two years after these proceedings were initiated – is unreasonable, burdensome, and untimely.

In doing so, OCC violated not just the intent, but also the letter of the Commission’s discovery rules. Under those rules, any party seeking to depose another party must “give reasonable notice in writing to the deponent, to all parties, and to the commission.” Ohio Adm.Code 4901-1-21(B). OCC did not give reasonable notice to AEP Ohio of its intent to conduct depositions. Instead, after months of inaction, Mr. Finnigan served a last-minute demand that AEP Ohio prepare witnesses for deposition on multiple topics within 6 days. And OCC violated the Commission’s requirements for requesting documents. Under the Commission’s rules, a notice of deposition “may be accompanied by a request, made in compliance with rule 4901-1-20 of the Administrative Code, for the production of documents or tangible things at the taking of the deposition.” Ohio Adm.Code 4901-1-21(E). Rule 4901-1-20

gives parties 20 days to respond to a request for production, unless the Commission reduces or extends the deadline for responding. *See* Ohio Adm.Code 4901-1-20-(C). OCC, however, gave AEP Ohio only 6 days.

While OCC is entitled to change counsel assigned to a particular case at will, it is unreasonable to assign new counsel at the eleventh hour in an attempt to disrupt or modify the proceeding or to undermine the Commission-approved process previously established in the proceeding. OCC sought intervention, and has been participating, in these proceedings since June 2020. During that time, OCC has propounded four sets of written discovery regarding the issues in this case, including those that are the subject of OCC's deposition notice, to which the Company has responded fully.

Rule 4901-1-24(A) of the Commission's procedural rules authorizes "the commission, the legal director, the deputy legal director, or an attorney examiner" to "issue any order that is necessary to protect a party \* \* \* from annoyance, embarrassment, oppression, or undue burden or expense." The Commission may order that "[d]iscovery not be had[,]" that it "be had only on specified terms and conditions[,]" or that it "be had only by a method of discovery other than that selected by the party seeking discovery[,]" among other options. Ohio Adm.Code 4901-1-24(A). Although AEP Ohio would be justified in asking the Commission to protect it from answering OCC's discovery requests at all, the Company is not making that request. Instead, AEP Ohio is willing to implement the cooperative offer its counsel made to OCC on January 7, 2021. AEP Ohio remains willing to respond to informal discovery requests (*see* Ohio Adm.Code 4901-1-16(F)), and would commit to provide expedited answers to a reasonable number of interrogatories. Of course, the comment deadline is rapidly approaching, so the feasibility of the Company's cooperative suggestion is correspondingly dwindling. But AEP Ohio simply asks

that it not be required to prepare last-minute deposition witnesses, for a proceeding with no hearing, or respond to document requests that demand a six-day turn-around.

Granting the relief AEP Ohio requests will not prejudice OCC. As noted above, OCC has participated fully in these proceedings, including through written discovery, and has had an ample opportunity to obtain information necessary to enable it to fully participate in the comment process. After filing comments per the Commission's directive in this case, OCC could file a motion for a hearing if it believes that the comment process is inadequate; but it should not be permitted to bypass, disrupt or modify that process in the eleventh hour when the Company is following the Commission's adopted process.

### **III. Conclusion**

For the reasons provided above, AEP Ohio respectfully requests that the Commission grant its motion for protective order. In particular, AEP Ohio asks that the Commission issue an order providing that AEP Ohio does not need to respond to OCC's Notice to Take Depositions and Requests for Production of Documents, and should instead make good-faith efforts to quickly respond to OCC's additional written discovery requests and possibly adjusting the comment deadline by 7-10 days.

Respectfully submitted,

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**Counsel for Ohio Power Company**

### **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Motion for Protective Order* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 11<sup>th</sup> day of January, 2021, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

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Summary: Motion Motion of Ohio Power Company for Protected Order (Part 1 of 2)  
electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company