

**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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**OHIO POWER COMPANY’S  
REPLY IN SUPPORT OF ITS  
MOTION FOR PROTECTIVE ORDER**

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On January 11, 2021, Ohio Power Company (“AEP Ohio” or the “Company”) filed a motion for protective order relating to the Office of the Ohio Consumers’ Counsel’s (“OCC’s”) late-filed (and subsequently re-filed) Notice to Take Depositions and Request for Production of Documents. In its Motion, the Company noted that it had responded fully to OCC’s prior written discovery (*see* AEP Ohio Motion for Prot. Order at 4) and made clear that it was willing to answer OCC’s questions informally or, alternatively, to provide expedited responses to any written discovery requests from OCC on the same topic. (*See id.* at 2.)<sup>1</sup> The Company simply requested that the Commission protect it from the annoyance and undue burden of preparing one or more witnesses for deposition in a proceeding that the Commission has not set for hearing, or from producing documents in a timeframe significantly shorter than the 20-day deadline set forth in the Commission’s rules. (*See id.* at 4, citing Ohio Adm.Code 4901-1-20(C) and -21(E).)

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<sup>1</sup> OCC asserts that its counsel attempted to call AEP Ohio’s counsel “several days before filing the deposition notice,” but “AEP Ohio’s counsel never returned this call.” (OCC Memo Contra at 9.) OCC is mistaken. As explained in the affidavit attached to the Company’s Motion, AEP Ohio’s counsel spoke with OCC’s counsel just before OCC filed its Notice. *See generally* Nourse Affidavit.

OCC responded by accusing AEP Ohio of being “entitle[d],” declared that the Commission should “penalize AEP, in quarter-million dollar increments, for its delay and distraction tactics[.]”<sup>2</sup> and asked the Commission to “order AEP to open its books and get out of OCC’s way \* \* \*.” (OCC Memo Contra at 1, 3, and 4.) In substance, OCC asserted that it “has the right to prepare its own case using the discovery tools it chooses” (*id.* at 6 and 10); that AEP Ohio has no right to file a protective order simply “because it would prefer” a different form of discovery (*id.* at 7); and that OCC is permitted to “use \* \* \* depositions in cases where no hearing is scheduled” (*id.* at 8). The Ohio Manufacturers’ Association Energy Group (“OMAEG”) filed its own memorandum contra a few days later, accusing AEP Ohio of trying to “limit the scope of the Commission’s review and the intervenors’ participation in the proceeding \* \* \*.” (OMAEG Memo Contra at 1.) OMAEG, like OCC, argued that “intervenors typically are afforded full discovery rights, even in proceedings without scheduled hearings.” (*Id.* at 5.) Neither OCC nor OMAEG, however, addressed the Company’s argument that OCC did not give the Company 20 days to respond to OCC’s document requests as required by the Commission’s rules, apparently conceding that those requests were unlawful.

With regard to OCC’s first main argument – that AEP Ohio has no right to object to the form of discovery OCC selected – the Commission’s rules say otherwise. As OCC indicates in its Memo Contra (at 1 and 5), parties to Commission proceedings have “ample rights of

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<sup>2</sup> OCC cites no statute or Commission rule authorizing the levying of quarter-million-dollar fines for alleged obstructionism in discovery, because there is none. Ohio statute authorizes the Commission to “assess a forfeiture of not more than ten thousand dollars” for failure to comply with a Commission order. R.C. 4905.54. The Commission’s rules also permit the Commission to sanction a party that “disobeys an order of the commission compelling discovery \* \* \*.” Ohio Adm.Code 4901-1-23(F). Neither law authorizes the Commission to levy astronomical penalties against parties accused only of being insufficiently cooperative in discovery. Regardless, in filing a motion for protective order pursuant to the Commission’s rules, and seeking a remedy that those rules specifically authorize the Commission to grant, AEP Ohio has done nothing warranting a penalty of any sort.

discovery” under R.C. 4903.082. But the same statute directs the Commission to review its rules “to aid full and *reasonable* discovery by all parties” (emphasis added), and specifically encourages the Commission to use “the Rules of Civil Procedure \* \* \* wherever practicable.” *Id.* In compliance with this directive, the Commission incorporated much of Civ.R. 26(C) (which governs protective orders in civil actions) into Ohio Adm.Code 4901-1-24.

Rule 4901-1-24(A) and Civ.R. 26(C) both permit a party “from whom discovery is sought” to file a motion for protective order to protect it “from annoyance, embarrassment, oppression, or undue burden or expense.” The Commission has advised parties to file such motions in proceedings where no hearing is scheduled, “should [a] party find [itself] subject to perceived, unreasonable discovery requests.” *In the Matter of the Commission’s Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Case No. 11-776-AU-ORD, Finding and Order ¶ 41 (Jan. 22, 2014). And Rule 4901-1-24(A)(3) and Civ.R. 26(C)(3) both permit the Commission or court to issue an order providing that “[d]iscovery may be had only *by a method of discovery other than that selected by the party seeking discovery \* \* \**.” (Emphasis added.) The Commission’s rules, in other words, explicitly authorize it to grant the relief that AEP Ohio has requested.

In this instance, AEP Ohio did not seek a protective order “because OCC seeks to depose its representative on topics that were also the subject of OCC’s prior written discovery.” (OMAEG Memo Contra at 6; *see also id.* at 7.) It also did not seek a protective order because it was worried that OCC’s counsel would be abusive during the deposition, or because OCC scheduled the deposition at an inconvenient time. (*See id.* at 8.) The Company filed the protective order for three reasons: (1) because OCC had served requests for production of

documents that required responses within six days, in violation of the Commission’s requirement to permit twenty days to respond to such requests (*see* AEP Ohio Motion at 4-5 (citing Ohio Adm.Code 4901-1-20(C)); (2) because OCC had waited until fifteen days before the end of the comment period to notice a deposition, in a case it had intervened in almost seven months prior, in violation of the Commission’s directive to complete discovery “as expeditiously as possible” (*id.* at 3-4 (quoting Ohio Adm.Code 4901-1-17(A)); and (3) because OCC’s notice of deposition would require AEP Ohio to prepare and put forward a witness to provide testimony in a proceeding in which the Commission had not chosen to schedule a hearing (*see id.* at 4-5).

With regard to OCC’s second argument, which OMAEG supports – that the Commission cannot prevent OCC from taking depositions in a case in which the Commission has not scheduled a hearing – OCC and OMAEG are also mistaken. The Company acknowledges that the Commission has found that “discovery is sometimes necessary [in a proceeding where no hearing is scheduled] to obtain sufficient information regarding an application or other pleading \* \* \* to provide substantive comments.” *In the Matter of the Commission’s Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Case No. 11-776-AU-ORD, Finding and Order ¶ 41 (Jan. 22, 2014).

Accordingly, AEP Ohio is not trying “to prevent the intervenors from thoroughly and adequately preparing their positions and arguments,” as OMAEG asserts. (OMAEG Memo Contra at 3.) Nor is the Company trying to avoid answering questions about “PPA Rider costs \* \* \* or OVEC’s ‘must run’ offer strategy,” as OMAEG further asserts. (*Id.* at 4-5.) The Company fully cooperated with OCC’s prior discovery requests on these topics and is still willing to work with

OCC now to provide whatever information it requires to file comments in this proceeding, as the Company represented in its Motion and noted again above.

But that does not mean OCC is entitled to take a deposition. In this proceeding, the Commission has permitted the filing of comments and reply comments (*see* Entry ¶ 8 (Dec. 7, 2020)), but it has not scheduled a hearing. That is the Commission’s right. And in proceedings in which no statute requires a hearing, the Commission has “discretion [to determine] whether to allow discovery, depositions and testimony.” *In the Matter of the Joint Application of Spring Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry on Rehearing ¶ 9 (Jan. 25, 2006). *See also In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP *et al.*, Opinion and Order at 32 (July 19, 2000) (“The Commission and the attorney examiners necessarily have considerable discretion in the procedural management of proceedings, including discovery.”); *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order ¶ 9 (Dec. 6, 2006) (rejecting OCC’s contention that “any interested person [has] the right to intervene, conduct discovery, and present evidence in any Commission case” and explaining that adopting OCC’s position “would eliminate the Commission’s discretion to conduct its proceedings in a manner it deems appropriate”).

By scheduling a deposition, OCC is attempting to override the Commission’s choice to conduct a paper proceeding. OCC’s deposition notice would require the Company to produce witnesses on two broad topics – “(1) whether AEP purchased [from FirstEnergy Solutions] more

of the output of the OVEC plants than it was obligated under the OVEC Agreement to purchase and charging its customers for such purchases; and (2) committing the OVEC plants into the PJM market as must-run units” – along with each witness’s resume and other documents related to their testimony. (OCC Notice to Take Depositions and Requests for Production of Documents at 1-2) (Jan. 14, 2021).) As with all depositions, “[e]xamination and cross-examination [would] proceed as permitted in commission hearings.” Ohio Adm.Code 4901-1-21(H). OCC would then file the transcript of its cross-examination of AEP Ohio’s in the docket and use it as evidence. (See OCC Memo Contra at 3 n.8 (noting OCC’s filing of a deposition transcript in a Duke Energy Ohio rider audit proceeding).) That is why OCC says it has rejected the Company’s offer to conduct informal discovery – because “informal discovery can have limitations or challenges for use as evidence[,]” whereas a deposition produces a “transcript.” (OCC Memo Contra at 10.) In short, OCC did not notice a deposition simply to gather information needed to submit comments, as OMAEG suggests (see OMAEG Memo Contra at 3). OCC noticed a deposition to force AEP Ohio to produce an expert witness, and the Commission to accept that witness’s testimony in this proceeding, whether the Commission wants it or not.

This is not how deposition transcripts are intended to be used. In a Commission proceeding that includes a hearing, “[d]epositions may be used in [the hearing] to the same extent permitted in civil actions in courts of record.” Ohio Adm.Code 4901-1-21(N). Nothing in the Commission’s rules permits the filing of deposition transcripts as evidence in proceedings without hearings. Indeed, the Commission has proposed modifications to Ohio Adm.Code 4901-1-21 to “specif[y] that a deposition transcript may not generally be used as substantive evidence in lieu of hearing testimony \* \* \*.” *In the Matter of the Review of Ohio Adm.Code Chapter*

*4901-1 Rules Regarding Practice and Procedure Before the Commission*, Case No. 18-275-AU-ORD, Entry ¶ 6 (Dec. 4, 2019).

The Commission also has rejected OCC’s past proposals to amend the Commission’s procedural rules to allow the introduction of evidence in all Commission proceedings outside of a hearing. For example, Rule 4901-1-16(B) states, in part, that a party may not object to discovery on the grounds 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.” Ohio Adm.Code 4901-1-16(B). In 2006, OCC proposed to replace “hearing” in this sentence with “proceeding.” *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order ¶ 38 (Dec. 6, 2006). Rule 4901-1-16(C) then states, in part, that any party may serve interrogatories on any other party asking it to “identify each expert witness expected to testify at the hearing \* \* \* .” OCC proposed to replace the phrase “testify at the hearing” with “submit testimony[,]” to reflect the Commission’s purposed “practice [of allowing] for testimony to be submitted even without a hearing being conducted \* \* \* .” *Id.* The Commission rejected both of OCC’s proposals. With respect to Rule 4901-1-16(B), the Commission explained that the existing regulatory language was more “appropriate” because “[a] hearing” is “where[ ] the presiding hearing officer rules upon the admissibility of evidence.” *Id.* And with respect to Rule 4901-1-16(C), the Commission stated that it accepts expert testimony in only a “limited” number of cases where “no hearing [is] held” and that it was better to address “the limits of discovery” in such cases “on a case-by-case-basis \* \* \* .” *Id.*

With AEP Ohio’s motion for protective order, the Company is now asking the Commission to address the limits of discovery in this proceeding. OMAEG argues that “[t]he

scope of this proceeding is still developing and \* \* \* may extend beyond the filing of comments.” (OMAEG Memo Contra at 5.) But it has been over four months since LEI released its audit report in this case, and no party has indicated any concern with the current scope of the proceeding. If either OCC or OMAEG believes that a hearing is merited in this case, it can move the Commission to schedule one and to set deadlines for the filing of expert testimony. Unless and until OCC or OMAEG files such a motion, however, and unless and until the Commission grants such a motion, OCC should not be permitted to depose Company witnesses and introduce their deposition transcripts into evidence. It is the Commission’s role to decide whether to receive expert testimony from AEP Ohio in this case – not OCC’s.

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 or any subsequent deposition notice unless and until the Commission orders an evidentiary hearing to take place in this proceeding. If the Commission schedules a hearing in this proceeding, AEP Ohio would not object to conducting a deposition; for now, the Commission has chosen to keep this a paper proceeding and AEP Ohio wishes to keep it that way as well.

As an alternative to fully granting the Company’s motion, AEP Ohio asks the Commission to direct OCC and the Company to make good-faith efforts to quickly respond to OCC’s additional written discovery requests on the topics raised in its Notice. If the Commission should deny AEP Ohio’s Motion for Protective Order, however, AEP Ohio asks that the Commission permit OCC to use the deposition transcript for discovery purposes only. AEP Ohio further requests that the Commission prohibit OCC from filing the transcript in the



docket and relying on it as substantive evidence, as OCC is presently improperly attempting in Case No. 20-167-EL-RDR. At a bare minimum, the Commission should exercise its case-by-case discretion by explaining in its ruling why a deposition is appropriate in this paper proceeding.

Respectfully submitted,

/s/ Steven T. Nourse

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### **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 Reply in Support of its Motion for Protective Order* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 27<sup>th</sup> day of January, 2021, via electronic transmission.

/s/ Steven T. Nourse

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Summary: Reply - Ohio Power Company's Reply In Support Of Its Motion For Protective Order  
electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company