

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the     )  
Reconciliation Rider of The Dayton Power    ) Case No. 20-165-EL-RDR  
and Light Company.                             )

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**JOINT MEMORANDUM CONTRA MOTION OF DP&L TO QUASH OCC'S NOTICE  
OF DEPOSITION**

**BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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Bruce Weston (0016973)  
Ohio Consumers' Counsel

William J. Michael (0070921)  
Counsel of Record  
Amy Botschner O'Brien (0074423)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone [Michael]: (614) 466-1291  
Telephone [Botschner O'Brien]: (614) 466-9575  
Telephone [Finnigan]: (614) 466-9585  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)  
(Counsel of Record)  
Thomas V. Donadio (0100027)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)  
(willing to accept service by e-mail)

February 1, 2021

*Counsel for the Ohio Manufacturers' Association  
Energy Group*

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**I. INTRODUCTION**

DP&L filed the wrong pleading, so the right decision is to overrule its attempt to thwart discovery, as we explain below. As background, the PUCO formerly required DP&L’s customers (at DP&L’s request) to subsidize electricity from two outdated, uneconomic coal power plants that are polluting the planet, as operated by the Ohio Valley Electric Corporation (“OVEC”). The utilities then apparently used their influence to convince the legislature to codify the subsidy, in scandal-ridden House Bill 6. Had state government not involved itself, the competitive market likely would have protected customers (and the planet) from these 20<sup>th</sup> Century coal-fired dinosaurs. PUCO audits of the OVEC charges (that more recently are paid by customers of DP&L, AEP Ohio, Duke, and FirstEnergy per House Bill 6) confirmed that “the OVEC plants cost more than they earn.”<sup>1</sup> That’s bad for consumers paying the subsidies.

The Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio Manufacturers’ Association Energy Group (“OMAEG”) intervened to participate in the audit investigation. That

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<sup>1</sup> *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 31 (Sept. 16, 2020).

included conducting discovery for protecting consumers from paying excessive and unreasonable costs for coal plant subsidies.

As we have found through the years, those like DP&L who feed at the public trough can display a sense of entitlement to their corporate welfare. That brings us to DP&L's motion to quash for preventing a deposition. DP&L seeks to prevent the review, despite the ample discovery rights guaranteed under Ohio law, PUCO rules and PUCO precedent.<sup>2</sup>

For starters, DP&L violated the Ohio Administrative Code by filing the wrong pleading – a motion to quash instead of the required motion for a protective order. So, DP&L's motion should be denied and the PUCO should order DP&L to immediately produce the deponent for OCC.

In its Motion to Quash, DP&L is bent on thwarting and has already delayed the intervenors' mere request to depose a DP&L official on the prudence of certain of the coal plant subsidies that it is charging to consumers. It's an old utility tactic that continues nearly forty years after – and despite – the legislature's discovery reform statute, R.C. 4903.082. That statute ensures the discovery rights for parties such as OCC that is performing state work to investigate DP&L and other utility monopolies and for OMAEG that represents Ohio manufacturers. That DP&L perceives it has license to even file a Motion to prevent the deposition suggests that the PUCO has failed to impose sufficient consequences to deter utilities from this obstructionist tactic.

The longstanding Ohio Administrative Code provisions for discovery, some of which date back to 1981 in their current form, are meant to facilitate thorough and adequate

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<sup>2</sup> For purposes of discovery, Ohio Adm. Code 4901-1-16(H) defines a party as any person who has filed a motion to intervene (“For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term ‘party’ includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.”).

preparation...” in PUCO cases.<sup>3</sup> And they’re “intended to minimize commission intervention in the discovery process.”<sup>4</sup>

Here, the PUCO is conducting annual audits of the charges to consumers for the coal power plant subsidies. Parties may consider any subsidy charge for these coal plants to be unreasonable and anti-competitive for consumers to pay. But even with the general approvals by the PUCO and the legislature for subsidizing coal plants, there are prudence issues – and the parties are investigating those issues for consumers. It is the parties’ right under law to do so.

The use of discovery additionally is important in this case because the PUCO auditor (Vantage Energy Consulting, LLC) offered no analysis of the issue of committing the plants into the PJM day ahead energy market as must-run versus economic. Why not – considering that the Auditors in the AEP and Duke cases did raise the issue?<sup>5</sup> The intervenors ask the PUCO to require Vantage to supplement its audit for this analysis.<sup>6</sup>

In the audit for protecting AEP’s consumers, the auditor noted that OVEC continued running the plants on days when the plants earned less revenue from selling electricity than the

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<sup>3</sup> Ohio Adm. Code 4901-1-16(A).

<sup>4</sup> *Id.*

<sup>5</sup> *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 9 (Sept. 16, 2020); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 10 (Oct. 15, 2020).

<sup>6</sup> Nor did the auditor address whether the FirstEnergy Solutions bankruptcy impacted the OVEC charges for DP&L, even though the auditors for AEP and Duke both concluded that the FES bankruptcy impacted AEP’s and Duke’s charges. *See: In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 16 (Sept. 16, 2020); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 13 (Oct. 15, 2020).

plants' variable operating costs.<sup>7</sup> Accordingly, the PUCO auditor in the AEP case recommended that OVEC reconsider its must-run offer strategy that caused these losses.<sup>8</sup>

OCC and OMAEG are permitted by state law and rule to investigate these and other issues by using discovery such as depositions. On December 23, 2020, OCC requested a deposition from DP&L to investigate the OVEC plants' must-run offer strategy in the PJM market and any costs associated with FirstEnergy Solutions' OVEC entitlement to protect consumers. DP&L responded with a motion to quash the notice of deposition.

OCC's request for a deposition is reasonable and consistent with law, rule, and precedent. Additionally, the information will help parties, including OCC and OMAEG, contribute to a just and expeditious resolution of the issues in this proceeding. As articulated below, DP&L's arguments are without merit. The intervenors appreciate the recent approach of Duke Energy, whose response to OCC's deposition notice was to provide the deponent on a coal plant cost issue.<sup>9</sup> The PUCO should therefore protect consumers and deny DP&L's motion to quash.

## **II. LAW AND ARGUMENT**

### **A. The PUCO should dismiss DP&L's motion because DP&L filed the wrong pleading and violated the Ohio Administrative Code.**

First, the PUCO should deny DP&L's motion to quash because it violates the Ohio Administrative Code. Under Ohio Adm. Code 4901-1-25(C), a motion to quash is permitted for opposing a subpoena. But OCC did not apply for a subpoena. Even so, a party opposing a subpoena under Rule 25 must establish that the subpoena was "unreasonable or oppressive."

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<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Deposition of John Swez (Jan. 12, 2021).

DP&L did not claim that the notice of deposition was unreasonable or oppressive. The PUCO should deny DP&L's motion.

Second and more to the point, DP&L simply filed the wrong pleading. The proper pleading in response to OCC's notice of deposition would have been a motion for protective order.<sup>10</sup> The rule for protective orders requires that the party seeking the motion must show that a protective order is necessary to protect it from "annoyance, embarrassment, oppression, or undue burden or expense."<sup>11</sup> DP&L did not attempt to make such a showing. The PUCO should deny DP&L's motion for this reason.

Under Rule 24(B), the movant must also show that it has exhausted all other reasonable means to resolve differences with the party seeking discovery. This DP&L also failed to show. That is another reason the PUCO should reject DP&L's motion.

Finally, under Rule 24(B)(3) the movant for a protective order must file an affidavit laying out all steps it took to resolve differences with the party seeking discovery. DP&L failed to file an affidavit. The PUCO should deny DP&L's motion and promptly order DP&L to make the deponent available.

**B. DP&L is required to demonstrate in a motion, if it can, that a protective order is necessary to shield it from annoyance, embarrassment, oppression, or undue burden or expense. It failed to do so.**

A party seeking a protective order (which would have been the correct filing for DP&L's incorrect claim) must establish, to prevail, that the protective order is necessary to protect it.<sup>12</sup> DP&L has not offered any reason why a deposition would result in annoyance, embarrassment, oppression or undue burden or expense.

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<sup>10</sup> Ohio Adm. Code 4901-1-24(A).

<sup>11</sup> *Id.*

<sup>12</sup> Ohio Adm. Code 4901-1-24(A).



OCC and OMAEG have a clear right to conduct discovery “to facilitate thorough and adequate preparation in commission proceedings” and under R.C. 4903.082.<sup>13</sup> The PUCO should deny a motion to quash when, as in this case, the party seeking to “quash” a deposition has not provided any specific grounds to establish annoyance, embarrassment, oppression or undue burden or expense. Those grounds are required to be shown, under Ohio Adm. Code 4901-1-24.

**C. OCC and OMAEG have a right to take depositions for consumer protection under Ohio law and the Ohio Administrative Code.**

OCC and OMAEG reasonably concluded that a deposition is the best available tool for investigating the OVEC plants’ must-run offer strategy and any costs associated with FirstEnergy Solutions’ OVEC entitlement. That is the intervenors’ choice to make.

DP&L is a co-owner of OVEC and may have relevant information on this topic. This discovery goes to whether DP&L acted prudently and in the best interests of its customers in its management of OVEC costs — the stated purpose of this audit.<sup>14</sup> This type of complex issue is best explored in a deposition, where a witness can be asked to explain the intricate details involved. The data to be considered include PJM day-ahead energy market prices and forward energy prices, as well as the following factors:

unit start-up costs, start-up times, cycling costs, risks with powering down and powering up units, such as unexpected outages that occur as a result of additional unit cycling, an operation that is required for environmental and other testing, impacts of multiple unit startups and shutdowns, as well as the loss of option values by missing the opportunity to respond to power price changes.<sup>15</sup>

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<sup>13</sup> Ohio Adm. Code 4901-1-16(A).

<sup>14</sup> “The Commission selects Vantage Energy Consulting, LLC to conduct the audit services necessary to assist the Commission in **the prudence and performance audit** of the Dayton Power and Light Company’s reconciliation rider for the period of November 1, 2018 through December 31, 2019.” Entry at ¶ 1 (Mar. 11, 2020) (emphasis added).

<sup>15</sup> *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Reply Comments of Duke Energy Ohio, Inc. at 18 (Jan. 8, 2021).

To investigate the issue, OCC and OMAEG seek to learn how each of these factors contributed to the must-run decision during the audit period. Some of these factors might have weighed in favor of a must-run commitment while other factors weighed against it. We concluded that a deposition is the best discovery tool to find out what weight to assign the different factors, how to balance the importance of each factor and how the values for each factor might have changed during the time period covered by the audit. That is a party's own judgment to make. A deposition will allow OCC, OMAEG, and other parties to discuss these matters with DP&L's witness and will produce more useful information than written discovery.

Depositions are often considered the most important effective tool in an attorney's toolbox. They allow for much more information to be gleaned and sooner, as compared to written discovery. Depositions, most importantly, allow for instantaneous follow-up to questions that are posed. Depositions allow attorneys to press for more information if answers are not detailed or forthcoming. These well-known fundamentals of the deposition as a discovery tool explain why DP&L wants the PUCO to prevent OCC, OMAEG and other parties from taking depositions. But again, the conducting of discovery and the form of discovery is the intervenors' choice to make, under law and rule.

DP&L's Motion to Quash should be denied.

**D. Parties are not limited to choosing one form of discovery over another.**

In the present case, DP&L argues that OCC should not be permitted to take a deposition when OCC can resort to written discovery to investigate this complex issue.<sup>16</sup> In doing so, DP&L mischaracterizes interrogatories and depositions as interchangeable discovery methods.<sup>17</sup>

Each method has distinct advantages and disadvantages. For example, depositions provide intervenors with an opportunity for spontaneous, direct contact with the deponent and the immediate ability to ask clarifying or follow-up questions.<sup>18</sup> Limiting the methods of discovery available in this case would thwart a full and complete development of the record and impair the ability of intervenors to protect their real and substantial interests in this proceeding.

Moreover, the Ohio Administrative Code leaves case preparation to the parties, per Ohio Adm. Code 4901-1-16(A). Under that state Code, OCC and OMAEG have the right to prepare their own case using the discovery tools they choose, not the ones that DP&L would like to choose for OCC and OMAEG to hinder our consumer advocacy. DP&L is wasting the parties' time and the PUCO's time with its obstruction.

In addition to glossing over fundamental differences between discovery methods, DP&L's argument defies PUCO precedent. The PUCO has determined that "depositions are not necessarily improper because substantial information (such as written testimony) is already

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<sup>16</sup> Motion to Quash at 1-2.

<sup>17</sup> *See, e.g., Id.* (stating, "[t]o the extent that OCC is unsatisfied with one or more of DP&L's prior responses [to interrogatories], the appropriate remedy is a motion to compel. There is no need to schedule a deposition to obtain the information that OCC seeks.").

<sup>18</sup> § 38:2. Advantages and disadvantages of depositions, 5 Ohio Jur. Pl. & Pr. Forms § 38:2 (2018 ed.).

available to a party and that the use of oral depositions in such a situation need not be precluded.”<sup>19</sup>

Furthermore, in this case, the parties did utilize written discovery requests to investigate complex issues, but DP&L objected. For example, in response to OCC’s written requests, DP&L stated that OCC should have used depositions to investigate complex issues, as shown below:

DP&L objects to each and every interrogatory that can be answered more efficiently by the production of documents or **by the taking of depositions**. Under the comparable Ohio Civil Rules, “[a]n interrogatory seeks an admission, or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidence, a function reserved by rules for depositions.” Penn Cent. Transp. Co. v. Armco Steel Corp., 27 Ohio Misc. 76, 77, 272 N.E.2d 877, 878 (Montgomery Cty. 1971). As Penn further noted, interrogatories that ask one to “describe in detail,” “state in detail,” or “describe in particulars” are “open end invitation[s] without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place.” Id., 272 N.E.2d at 878. <sup>20</sup>

Now that OCC and others seek a deposition to investigate complex issues, as a response to DP&L’s objection to OCC’s written discovery, DP&L whipsaws parties by arguing that DP&L should not be required to submit to a deposition either. By objecting to a party’s written discovery and now objecting to parties’ attempt to take a deposition, DP&L would leave no method of discovery available to parties.

DP&L’s objections are inconsistent with the PUCO’s objective that parties shall have broad rights to discovery “to facilitate thorough and adequate preparation for participation in

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<sup>19</sup> *In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 79-1184-TP-AIR, 1980 WL 625298, Entry at ¶ 5 (Aug. 4, 1980).

<sup>20</sup> *In the Matter of the Review of the Reconciliation Rider of The Dayton Power & Light Company*, Case No. 20-165-EL-RDR The Dayton Power & Light Company’s Objections and Responses to the Ohio Consumers’ Counsel’s Interrogatories and Requests for Production of Documents (Second Set) at 3 (Jan. 6, 2021) (emphasis added).

commission proceedings.” Ohio Adm. Code 4901-1-16(A). That is exactly what the intervenors seek through a deposition of DP&L’s witness: discovery during the prehearing phase of the proceeding to adequately participate in the proceeding (including the filing of comments and reply comments). The rule does not require that a hearing be held; it only explains the timing of the discovery.

Ohio Adm. Code 4901-1-16(B) states: “Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission.” Under law and rule, the intervenors chose a deposition. That is their choice to make.

**E. Neither the Ohio Administrative Code nor PUCO precedent precludes depositions from being conducted in cases that have not been set for hearing.**

DP&L also seeks to quash the deposition on the ground that a deposition is improper because no evidentiary hearing has been scheduled.<sup>21</sup> The utilities have been trotting out that tired old argument for years to interpose delay. But, as previously explained, the Ohio Administrative Code does not bar the use of depositions in cases where no hearing is scheduled. To the contrary, the Code broadly provides parties with an unlimited right to take depositions:

Any party to a pending commission proceeding may take the testimony of any other party or person, other than a member of the commission staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code.<sup>22</sup>

By arguing that depositions can be used only in cases involving a hearing, DP&L is unlawfully attempting to re-write the Ohio Administrative Code rule on depositions<sup>23</sup> and create

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<sup>21</sup> Motion to Quash at 2.

<sup>22</sup> Ohio Adm.Code 4901-1-21(A).

<sup>23</sup> See *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 (2008) (“we cannot generally add a requirement that does not exist in the Constitution or a statute”); *Wachendorf v. Shaver*, 149

a new limitation on depositions that the PUCO did not choose to include when it adopted the rule. Not even JCARR does that. Moreover, OCC and OMAEG need to take this deposition to investigate whether grounds exist to file a motion requesting an evidentiary hearing. In any event, intervenors are typically afforded full discovery rights, even in proceedings without scheduled hearings.<sup>24</sup> The PUCO should therefore reject this argument.

**F. Ohio law, the Ohio Administrative Code and PUCO precedent do not require that discovery occur in a specific order.**

Finally, DP&L seeks a motion to quash because “other, less intrusive means of discovery are preferred at least as the initial steps in a litigated matter.”<sup>25</sup> What’s really intrusive is that DP&L is taking its consumers’ money to subsidize two outmoded, uneconomic, dirty coal plants. What comes with that corporate welfare is regulatory review, including this discovery.

The Ohio Administrative Code does not create any sequential order in which the various methods of discovery must be sought. In any event, parties already submitted interrogatories and requests for production of documents to DP&L and DP&L objected and did not respond. As noted above, a party seeking discovery has the prerogative to choose the most suitable discovery tool, not the party responding to discovery. DP&L’s objections to parties’ written discovery suggested that a deposition is the appropriate tool to investigate complex matters, so the parties responded to DP&L’s objection by scheduling this deposition. Parties, including DP&L,

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Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948) (“it is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom.”).

<sup>24</sup> See, e.g., *In the Matter of the Commission’s Investigation into PALMco Power OH, LLC DBA Indra Energy and PALMco Energy OH, LLC DBA Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI Entry at ¶ 15 (Mar. 9, 2020) (scheduling a discovery conference in a Commission investigation prior to granting any stakeholder intervention or determining that a hearing would be held); *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Service Supplier*, Case Nos. 11-5886-EL-CRS, et al., Entry at ¶ 11 (Mar. 3, 2020) (establishing a deadline to respond to discovery requests in a Commission investigation before granting any stakeholder intervention or determining that a hearing would be held).

<sup>25</sup> Motion to Quash at 2.

participating in the deposition are more than capable of exercising their rights and ensuring that discovery is conducted in accordance with the Ohio Administrative Code.<sup>26</sup> The PUCO should therefore reject this argument for quashing the deposition.

### **III. CONCLUSION**

The PUCO's rules recognize how important discovery is "to facilitate thorough and adequate preparation for participation in commission proceedings."<sup>27</sup> R.C. 4903.082 ensures discovery rights for OCC and OMAEG. The intervenors are exercising their rights to take a deposition of DP&L.

DP&L has advanced several meritless arguments for "quashing" the deposition. Further, DP&L filed the wrong pleading under the Ohio Administrative Code (when it filed to quash instead of for a protective order), and therefore it should be ignored, and the deposition should proceed. The PUCO should reject DP&L's motion to quash the deposition and order DP&L to immediately make the deponent available for the intervenors.

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<sup>26</sup> See, e.g., *In the Matter of the Application of the Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 77-553-EL-AIR, 1977 WL 424255, Entry at ¶¶ 12 -13 (Dec. 7, 1977) (denying a motion for protective order against the use of depositions because movant failed to demonstrate bad faith of the deposing parties and the PUCO determined counsel for participating parties would be aware of and capable of exercising their rights should any abuse of the discovery process occur in a deposition).

<sup>27</sup> Ohio Adm.Code 4901-1-16(A).

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ John Finnigan

William J. Michael (0070921)  
Counsel of Record  
Amy Botschner O'Brien (0074423)  
John Finnigan (0018689)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, 7th Floor  
Columbus, Ohio 43215  
Telephone [Michael]: (614) 466-1291  
Telephone [Botschner O'Brien]: (614) 466-9575  
Telephone [Finnigan]: (614) 466-9585  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[amy.botschner.obrien@occ.ohio.gov](mailto:amy.botschner.obrien@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
(willing to accept service by e-mail)

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402)  
(Counsel of Record)  
Thomas V. Donadio (0100027)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)  
(willing to accept service by e-mail)

*Counsel for the Ohio Manufacturers'  
Association Energy Group*



### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Joint Memorandum Contra was served on the persons stated below via electric transmission this 1st day of February 2021.

/s/ John Finnigan

John Finnigan (0018689)

Assistant Consumers' Counsel

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

### **SERVICE LIST**

[kyle.kern@ohioattorneygeneral.gov](mailto:kyle.kern@ohioattorneygeneral.gov)

[thomas.lindgren@ohioattorneygeneral.gov](mailto:thomas.lindgren@ohioattorneygeneral.gov)

Attorney Examiners:

[patricia.schabo@puco.ohio.gov](mailto:patricia.schabo@puco.ohio.gov)

[michael.williams@puco.ohio.gov](mailto:michael.williams@puco.ohio.gov)

[michael.schuler@aes.com](mailto:michael.schuler@aes.com)

[paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)

[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)

[donadio@carpenterlipps.com](mailto:donadio@carpenterlipps.com)

[randall.griffin@aes.com](mailto:randall.griffin@aes.com)

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Summary: Memorandum Joint Memorandum Contra Motion of DP&L to Quash OCC's Notice of Deposition by Office of The Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Tracy J Greene on behalf of Finnigan, John