

In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018.)	Case No. 18-1004-EL-RDR
)	
In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019.)	Case No. 18-1759-EL-RDR
)	

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March 17, 2021

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

**JOINT MOTION TO COMPEL DEPOSITION OF AEP
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") intervened to participate in the audit investigation of coal plant charges. That includes conducting discovery regarding the potential that Ohio Power Company ("AEP") is charging imprudent and unreasonable amounts for coal plant subsidies (for two OVEC coal plants that increase electric bills and s pollute the planet). That prospect would be contrary to the PUCO's standard for the coal plants to be run in a manner consistent with competition.¹ In essence, AEP's 1.5 million consumers are required to send their subsidy dollars to AEP including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no consumer benefits.

¹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

In the case at bar, AEP seeks to prevent a deposition, despite the ample discovery rights guaranteed under Ohio law, the Ohio Administrative Code and precedent of the Public Utilities Commission of Ohio (“PUCO”).

The PUCO ordered an audit of the OVEC charges that AEP customers pay (as well as audits for the OVEC charges that Duke and DP&L customers pay). The auditor confirmed that “the OVEC plants cost more than they earn.”² In fact, the PUCO auditor in the AEP case noted that OVEC continued running the plants on days when the plants earned less revenue from selling electricity than the plants’ variable operating costs.³ Accordingly, the AEP Ohio auditor recommended that OVEC reconsider its must-run offer strategy that caused these losses.⁴

In order to explore this issue on deposition, OCC and OMAEG jointly move the PUCO for an order compelling AEP to make witnesses available for a deposition. And, as allowed under rule, we ask that AEP produce the documents as requested in OCC’s Notice of Depositions and Requests for Production of Documents served on January 7, 2021.

AEP responded to OCC’s discovery with a Motion for a Protective Order to prevent parties from taking the deposition⁵ and to limit the methods of discovery available to parties. The PUCO has yet to rule on AEP’s motion for protection. The PUCO should deny AEP’s motions and the depositions should proceed.

² *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).

³ *Id.* at 9.

⁴ *Id.*

⁵ Motion of Ohio Power Company for Protective Order (Jan. 11, 2021).

We do ask the PUCO to grant OCC and OMAEG's Joint Motion to Compel Deposition of AEP and issue an order compelling AEP Ohio's designee to appear at deposition. But the PUCO should resolve the issue *now* by also denying AEP's motion for protection.

For the reasons set forth in the attached Memorandum in Support, OCC and OMAEG respectfully request that the PUCO grant this Motion.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. LAW AND ARGUMENT	2
A. Parties have a right to this discovery.	2
B. The information sought is reasonably calculated to lead to the discovery of admissible evidence.	5
C. AEP Ohio has failed to show how the request for a deposition is unreasonable, burdensome or untimely.	8
D. OCC undertook reasonable efforts to resolve the discovery dispute.....	9
III. CONCLUSION.....	10

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 16, 2020 and January 11, 2021 respectively, OCC and OMAEG intervened in this proceeding. AEP Ohio did not oppose either stakeholder's intervention. As allowed under Ohio law, the Ohio Administrative Code, and PUCO precedent, OCC served four sets of interrogatories and requests for production of documents and OMAEG served one set of requests for production of documents on AEP Ohio.

Also, to assist OCC, as well as OMAEG, in obtaining information reasonably calculated to lead to the discovery of admissible evidence, OCC issued a notice to take deposition, in which OMAEG intends to participate. Issues for deposition include but are not limited to: (1) the impact on AEP Ohio's customers of the FirstEnergy Solutions bankruptcy; and (2) how and why OVEC commits its plants in the PJM day-ahead energy market and the impact on the subsidies that consumers pay. In essence, AEP's 1.5 million consumers are required to send their subsidy dollars to AEP including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no benefits.

Consistent with the PUCO's rules, counsel has made reasonable efforts to resolve differences with AEP Ohio and obtain information regarding the above-referenced issues. OCC's counsel called AEP Ohio's counsel several days before scheduling a deposition and left a voicemail message explaining OCC's request to take a deposition on these topics and asking for dates when it would be convenient for AEP Ohio's counsel and witness to appear at a deposition. AEP Ohio's counsel never responded to this call.

OCC then issued a Notice of Deposition to take the deposition on January 7, 2021, or at a time that is mutually convenient.⁶ AEP Ohio filed a Motion for Protective Order and stated therein, "it is not clear that the Company has an obligation to conduct discovery in this case."⁷ There being an impasse, OCC has exhausted all reasonable means of resolving any differences, leading to the filing of this Joint Motion to Compel.

II. LAW AND ARGUMENT

A. Parties have a right to this discovery.

The PUCO previously determined that "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."⁸ The PUCO's 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."⁹ The rules are also intended to "minimize commission

⁶ Notice to Take Depositions and Requests for Production of Documents (Jan. 7, 2021).

⁷ Motion for Protective Order of AEP Ohio at 2 (Jan. 11, 2021).

⁸ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

⁹ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

intervention in the discovery process."¹⁰ These rules are meant to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C.

4903.082.

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”¹¹ The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases.

Despite these reforms, AEP Ohio is impeding parties’ discovery efforts. The PUCO should not allow AEP Ohio to use these obstructionist tactics to deny parties their ample discovery rights under Ohio law and PUCO rules. OCC and OMAEG, as parties in this proceeding, are entitled to select a deposition as a method to obtain discovery and investigate the complex issues in this case. Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules. It is both unreasonable and unlawful for AEP Ohio to refuse to make itself available for deposition regarding the complex issues in this case.

The Ohio Administrative Code contains rules that specifically define the scope of discovery, in Ohio Admin. Code 4901-1-16(B):

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.)

¹⁰ Ohio Admin. Code 4901-1-16(A).

¹¹ See also *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

This rule is similar to Civ. R. 26(B), 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.¹²

Parties' rights to discovery are assured by law, rule and Supreme Court of Ohio ("Court") precedent.¹³ Parties are entitled to obtain a deposition from AEP Ohio. AEP Ohio will continue to refuse to submit to a deposition unless the PUCO compels it.

In Ohio Admin. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Admin. Code 4901-1-23(A) and (B) provide a means for the PUCO to compel a party to respond to a discovery request when the party has failed to do so. Ohio Admin. Code 4901-1-23(C) details the technical requirements for a motion to compel, all of which OCC and OMAEG meet..

The Motion to Compel is to be accompanied by a Memorandum in Support setting forth (1) the basis of the Motion and authorities relied upon; (2) a brief explanation of how the information sought is relevant; and (3) responses to objections raised by the party from whom the discovery is sought.¹⁴ Finally, Ohio Admin. Code 4901-1-23(C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

OCC has detailed in the accompanying Affidavit of John Finnigan, consistent with Ohio Admin. Code 4901-1-23(C)(3), the efforts that it undertook to resolve differences between it and AEP Ohio. At this point, there can be no resolution of this discovery dispute without PUCO

¹² *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

¹³ *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

¹⁴ Ohio Admin. Code 4901-1-23(C)(1).

intervention. Parties seek a deposition from AEP Ohio and AEP Ohio will not allow the deposition without the PUCO compelling such a result.

B. The information sought is reasonably calculated to lead to the discovery of admissible evidence.

This case involves a prudency review of the OVEC costs and AEP Ohio's charges for OVEC costs. The Auditor's Report raised certain issues as to whether these costs are reasonable. The first issue involves AEP Ohio receiving a share of FirstEnergy Solutions' OVEC entitlement after FirstEnergy Solutions filed for bankruptcy. The Auditor noted that "the FirstEnergy Solutions bankruptcy impacted OVEC and AEP Ohio charges."¹⁵

The same issue arose in the Duke OVEC case and (unlike AEP Ohio) Duke provided a witness for deposition, as required by the PUCO's rules.¹⁶ Based on information provided at deposition and in Duke's reply comments, OCC was able to determine that Duke's customers were not impacted by FirstEnergy Solutions' OVEC costs during the audit period. OCC therefore withdrew this issue from its initial comments in that case.¹⁷

Here AEP rejected the request for deposition, and so a relevant issue still exists as to whether AEP Ohio's customers were impacted by FirstEnergy Solutions' OVEC costs during the audit period. Parties need to depose an AEP Ohio representative to explore this issue. AEP Ohio's customers might have been impacted by these costs during the audit period. The FirstEnergy Solutions bankruptcy lasted from 2018 through 2020 and AEP Ohio may have acted imprudently in its decisions regarding when and how to bill for these costs. The Auditor

¹⁵ Audit Report at 16.

¹⁶ *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).

¹⁷ *Id.* Correspondence on behalf of the Office of Ohio Consumers' Counsel (Jan. 19, 2021).

suggested that AEP Ohio's customers were impacted by stating that the FirstEnergy Solutions bankruptcy impacted AEP Ohio's charges.¹⁸

The second issue involves committing the plants into the PJM day-ahead energy market as must-run. The Auditor recommended that OVEC change its practice because this was resulting in "negative earnings" where the fuel cost exceeded the value of the electricity produced.¹⁹

OCC requested a deposition to question an AEP Ohio official about these complex topics. The Auditor's Report suggested the possibility of imprudent actions in each area. OCC and OMAEG intend to question AEP Ohio to determine, inter alia, exactly what actions AEP Ohio and OVEC took, whether AEP Ohio's and OVEC's actions were reasonable and whether AEP's and OVEC's actions caused customers to pay higher costs. OCC and OMAEG also intend to question the witness about, inter alia, other issues relating to prudence, such as how OVEC manages the coal purchasing, coal inventory and ancillary services for the plants.

OCC reasonably exercised its right under Ohio Admin. Code 4901-1-21 to take the testimony of AEP Ohio by deposition on oral examination with respect to matters within the scope of discovery in this proceeding. OCC and OMAEG intend to use the discovery tool of a deposition as the best available tool for investigating the Auditor's recommendation or lack thereof regarding OVEC's must-run offer strategy and the other issues relating to prudence. Parties have a right under the 1983 reform law, R.C. 4903.082, to conduct discovery on these issues.

¹⁸ Audit Report at 16.

¹⁹ Audit Report at 9 and 53.

Depositions are often considered the most important and 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. In reality, these well-known fundamentals of the deposition as a discovery tool explain why AEP Ohio wants the PUCO to prevent the intervenors from taking depositions.

The PUCO ordered, "that *any* conclusions, results, or recommendations formulated by the auditor may be examined by *any* participant to this proceeding."²⁰ Accordingly, in this proceeding where AEP Ohio bears the burden of proving its prudence, parties are lawfully exploring the prudence of using the OVEC units as must-run units and the other issues noted above. The Auditor's Report indicates that these issues increased OVEC's costs, therefore it is important to explore any detriment of this decision on AEP customers.

These complex issues are best explored in a deposition, which may be why AEP is objecting. In a deposition a witness can be asked to explain the intricate details involved with the daily operations of the uneconomic power plants. As to the must-run issue, 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

²⁰ Entry at ¶ 11 (January 15, 2020) (emphasis added).

unit startups and shutdowns, as well as the loss of option values by missing the opportunity to respond to power price changes.²¹

Parties seek to assess how various factors contributed to the must-run decision during the 2018-2019 audit period. A deposition is appropriate for parties' assessment of these matters that are directly related to the rates and charges that consumers pay. OCC and OMAEG also seek to investigate the issue as to whether the FirstEnergy Solutions bankruptcy impacted AEP Ohio's charges and the other above-mentioned issues. AEP Ohio does not even attempt to argue that a deposition would not provide information that is reasonably calculated to lead to the discovery of admissible evidence. The PUCO should therefore compel AEP Ohio to appear at deposition.

C. AEP Ohio has failed to show how the request for a deposition is unreasonable, burdensome or untimely.

AEP Ohio claims that the request for a deposition is "unreasonable, burdensome and untimely."²² AEP Ohio's objection that it is overly burdensome to respond to the request for a deposition is conclusory and does not explain why a deposition would be burdensome. Federal case law²³ has held that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.²⁴ In

²¹ *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).

²² Motion for Protective Order at 4.

²³ Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Admin. Code 4901-1-24 allows a protective order to limit discovery to protect against "undue burden and expense." C.R. 26(c) similarly allows a protective order to limit discovery "to protect against undue burden and expense." *Cf. In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters***will be unduly burdensome."

²⁴ *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.²⁵ General objections without specific support may result in waiver of the objection.²⁶

AEP Ohio argues that it was willing to appear at an informal interview in lieu of a deposition. That is an old tactic to prevent effective discovery. We intend to depose, where answers are under oath and subject to formal motions if there is a lack of responsiveness. And we want answers under oath that can be used for discovery purposes and evidentiary purposes.

AEP Ohio does not even attempt to explain why an informal interview would subject its representative to a greater burden than a deposition. AEP's statement that a deposition would be burdensome and oppressive is therefore a conclusory statement and it should be disregarded. As explained in OCC and OMAEG's memorandum contra,²⁷ AEP Ohio has offered no valid grounds for its statement that the deposition request is unreasonable, burdensome or untimely.

The PUCO should realize that AEP's grounds may be that it just doesn't want its personnel answering questions about OVEC under oath and in live depositions. And the PUCO should consider the inappropriateness of AEP thwarting our investigation of its subsidy charges when the prevailing attitude of the utility should be cooperation in deference, if not in gratitude, for the massive subsidy it is enjoying courtesy of Ohioans (our clients).

D. OCC undertook reasonable efforts to resolve the discovery dispute.

As detailed in the accompanying Affidavit of John Finnigan, OCC undertook efforts to resolve this discovery dispute. Mr. Finnigan called AEP Ohio's counsel, Mr. Nourse, prior to issuing a Notice of Deposition and left a voicemail message explaining the request for a deposition and asking Mr. Nourse for dates when it would be convenient. Mr. Nourse never

²⁵ *Rosenberg v. Johns-Manville*, (M.D.Pa 1980), 85 RR.D. 292, 297.

²⁶ *Id.*, citing *In re Folding Carton Anti-Trust Litigation*, (N.D. HI. 1978), 83 F.R.D. 251, 264.

²⁷ See Memorandum Contra of OCC (Jan. 20, 2021); Memorandum Contra of OMAEG (Jan. 26, 2021).

responded to this voicemail message. OCC had no other recourse but to issue the Notice of Deposition. AEP Ohio offered to provide informal discovery in lieu of a deposition but this was not acceptable to OCC because under the PUCO's rules, informal discovery cannot be used as evidence. OCC has exhausted all other reasonable means to resolve differences between it and AEP Ohio. OCC and AEP Ohio have an irreconcilable difference as to whether parties have a right to depose an AEP Ohio official.

III. CONCLUSION

Under Ohio law and the Ohio Administrative Code, parties have a right to discover information regarding the OVEC coal plants. That relates to the PUCO's review of the prudence and reasonableness of AEP's charges to its 1.5 million consumers for coal plant subsidies.

The PUCO, consistent with Ohio law and the Ohio Administrative Code, should grant OCC and OMAEG's Joint Motion to Compel. AEP's 1.5 million consumers are required to send their subsidy dollars to AEP including for an Indiana coal plant. And that Indiana coal plant sends back to Ohio dirty air from its smokestack, with no benefits for AEP's consumers. Therefore, OCC and OMAEG's Joint Motion to Compel should be granted and AEP should be ordered to appear at deposition in the near term.

However, the PUCO should soon rule on AEP's motion for protection by denying it. And that should provide sufficient basis for the depositions to proceed.

Respectfully submitted,

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/s/ John Finnigan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel was served on the persons stated below via electric transmission this 17th day of March, 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:

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**NOTICE TO TAKE DEPOSITIONS
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Counsel for Ohio Power Company

Please take notice under Ohio Adm. Code 4901-1-21(B) that the Office of the Ohio Consumers' Counsel ("OCC") will take the oral depositions of the following individuals, one after the other, beginning on January 13, 2021 at 10:00 a.m. Eastern Time, or at a date and time as mutually agreed upon by OCC and Ohio Power Company ("AEP"):

- a) A person with knowledge and expertise regarding whether AEP purchased a share of the FirstEnergy Solutions' ("FES") OVEC entitlement after FES declared bankruptcy and repudiated its obligation to purchase its share.

- b) A person with knowledge and expertise regarding whether AEP received any funds or value from OVEC from the FES bankruptcy court settlement between OVEC and FES (i.e., the settlement relating to FES' attempt to repudiate its obligation to purchase power from the OVEC plants under the Amended and Restated Inter-Company Power Agreement ("OVEC Agreement")).
- c) A person with knowledge and expertise as to the obligations of AEP under the OVEC Agreement, including any obligation to purchase another co-owner's share of the OVEC output.
- d) A person with knowledge and expertise of the decision to commit the OVEC plants in the PJM market as must-run units.

The depositions will take place through a Zoom or Microsoft Teams conference or by telephone, as mutually agreeable to OCC and AEP. The deponents will appear at the agreed upon time and date and remain available until the deposition is completed.

The depositions will be taken of the aforementioned deponents on relevant topics within the scope of these proceedings, including: (1) whether AEP purchased 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. The depositions will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions.

Under Ohio Adm. Code Rules 4901-1-21(E) and 4901-1-20, each deponent is requested to produce two hours prior to the deposition and to bring copies to the telephonic deposition, the following documents:

- 1. A copy of the deponent's resume and/or C.V.
- 2. All documents related to the deponent's knowledge or expertise of the subjects identified in the sub-paragraphs above.
- 3. A copy of the current OVEC agreement.
- 4. A copy of the Audit Report.
- 5. A copy of AEP's responses to data requests in this case.

Respectfully submitted,

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/s/ John Finnigan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Notice to Take Deposition and Request for Production of Documents were served on the persons stated below via electric transmission this 7th day of January 2021.

/s/ John Finnigan
John Finnigan (0018689)
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**NOTICE TO TAKE DEPOSITIONS
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

To: Steven T. Nourse (0046705)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Fax: (614) 716-2950
Email: stnourse@aep.com
Counsel for Ohio Power Company

Please take notice under Ohio Adm. Code 4901-1-21(B) that the Office of the Ohio Consumers' Counsel ("OCC") will take the oral depositions of the following individuals, one after the other, beginning on January 21, 2021 at 10:00 a.m. Eastern Time, or at a date and time as mutually agreed upon by OCC and Ohio Power Company ("AEP"):

- a) A person with knowledge and expertise regarding whether AEP purchased a share of the FirstEnergy Solutions' ("FES") OVEC entitlement after FES declared bankruptcy and repudiated its obligation to purchase its share.

- b) A person with knowledge and expertise regarding whether AEP received any funds or value from OVEC from the FES bankruptcy court settlement between OVEC and FES (i.e., the settlement relating to FES' attempt to repudiate its obligation to purchase power from the OVEC plants under the Amended and Restated Inter-Company Power Agreement ("OVEC Agreement")).
- c) A person with knowledge and expertise as to the obligations of AEP under the OVEC Agreement, including any obligation to purchase another co-owner's share of the OVEC output.
- d) A person with knowledge and expertise of the decision to commit the OVEC plants in the PJM market as must-run units.

The depositions will take place through a Zoom or Microsoft Teams conference or by telephone, as mutually agreeable to OCC and AEP. The deponents will appear at the agreed upon time and date and remain available until the deposition is completed.

The depositions will be taken of the aforementioned deponents on relevant topics within the scope of these proceedings, including: (1) whether AEP purchased 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. The depositions will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions.

Under Ohio Adm. Code Rules 4901-1-21(E) and 4901-1-20, each deponent is requested to produce two hours prior to the deposition and to bring copies to the telephonic deposition, the following documents:

- 1. A copy of the deponent's resume and/or C.V.
- 2. All documents related to the deponent's knowledge or expertise of the subjects identified in the sub-paragraphs above.
- 3. A copy of the current OVEC agreement.
- 4. A copy of the Audit Report.
- 5. A copy of AEP's responses to data requests in this case.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ John Finnigan

Christopher Healey (0086027)
Counsel of Record
William Michael (0070921)
John Finnigan (0018689)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [Michael]: (614) 466-1291
Telephone [Finnigan]: (614) 466-9585
christopher.healey@occ.ohio.gov
william.michael@occ.ohio.gov
john.finnigan@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Notice to Take Deposition and Request for Production of Documents were served on the persons stated below via electric transmission this 14th day of January 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

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**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.)	

MOTION OF OHIO POWER COMPANY FOR PROTECTIVE ORDER

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

Steven T. Nourse (0046705), Counsel of Record
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
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Telephone: (614) 716-1608
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Email: stnourse@aep.com

(willing to accept service by e-mail)

Counsel for Ohio Power Company

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,

/s/ Steven T. Nourse

Steven T. Nourse (0046705), Counsel of Record
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
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Telephone: (614) 716-1608
(614) 716-1915
Fax: (614) 716-2950
Email: stnourse@aep.com

(willing to accept service by e-mail)

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 11th day of January, 2021, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

EMAIL SERVICE LIST

William.Michael@occ.ohio.gov;
Christopher.Healey@occ.ohio.gov;
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1/11/2021 5:12:17 PM

in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

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



Nurse Affidavit 002 18-1108.DOCX

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E-Signature Summary

Signer 1: Steven T. Nourse (STN)

January 11, 2021 12:01:21 -8:00 [36A53867905A] [167.239.2.88]
 stnourse@aep.com (Personally Known)

E-Signature Notary: S. Smithhisler (SRS)

January 11, 2021 12:01:21 -8:00 [BA7F4A945E08] [167.239.2.87]
 srsmithhisler@aep.com

I, S. Smithhisler, did witness the participants named above electronically sign this document.



**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.)	

AFFIDAVIT OF STEVEN T. NOURSE

I, Steven T. Nourse, being first duly sworn, hereby depose and state as follows based on my personal knowledge and belief:

1. I am employed by Ohio Power Company, a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP Ohio"), as Vice President – Legal. My business address is 1 Riverside Plaza, Columbus, Ohio 43210.

2. I am submitting this Affidavit in support of AEP Ohio's Motion for Protective Order.

3. On January 7, 2021, I spoke with counsel for The Office of the Ohio Consumers' Counsel ("OCC"), John Finnigan.

4. On that call, I offered to answer informally any questions Mr. Finnigan and OCC might have about the subject of this proceeding.

5. On that call, I also voluntarily offered to answer any written discovery requests from OCC in an expedited manner, so that OCC would receive those responses before the initial comment deadline in this proceeding.

6. On that call, I also offered to coordinate with OVEC personnel to conduct an informal video conference to discuss OCC's questions.

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7. On that call, Mr. Finnigan replied that he would take my suggestions under consideration and notify AEP Ohio of OCC's response.

8. OCC served and filed its Notice to Take Depositions and Requests for Production of Documents within an hour of my conversation with Mr. Finnigan.

9. A true and accurate copy of OCC's Notice to Take Depositions and Requests for Production of Documents is attached to my Affidavit.

10. Neither Mr. Finnigan nor any other attorney representing OCC contacted me again before serving OCC's Notice to Take Depositions and Requests for Production of Documents.

11. Given OCC's failure to respond before serving the Notice to Take Depositions and Requests for Production of Documents, and further given the speed with which OCC filed and served that discovery following my conversation with Mr. Finnigan, I believe AEP Ohio has exhausted all reasonable means of resolving its differences with OCC regarding discovery in this proceeding.

FURTHER AFFIANT SAYETH NAUGHT.

Steven T. Nourse

Signed on 2021/01/11 12:01:21 -8:00

Steven T. Nourse

Sworn to before me and subscribed in my presence this 11th day of January, 2021.



S. Smithhisler

Signed on 2021/01/11 12:01:21 -8:00

Notary Public

COLUMBUS/1595897v.1

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in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

Summary: Affidavit -Affidavit to Motion of Ohio Power Company For Protected Agreement
(Part 2 of 2) electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

**AFFIDAVIT OF JOHN FINNIGAN
IN SUPPORT OF MOTION TO COMPEL**

I, John Finnigan, Assistant Counsel for the Ohio Consumers' Counsel ("OCC") in the above-captioned case, submit this affidavit in support of the Joint Motion to Compel AEP to Respond to Discovery Regarding Charges to Consumers for Subsidized Coal Power Plants by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group.

1. On January 7, 2021, I caused to be filed in this case a Notice to Take Depositions and Requests for Production of Documents of AEP witnesses.
2. Several days before this filing, I called Mr. Steve Nourse, counsel for AEP. Mr. Nourse did not answer his phone. I left a voicemail message stating that I would like to take a deposition of an AEP witness on two issues in this case: (a) AEP's acquisition of a share of the FirstEnergy Solutions ("FES") Ohio Valley Electric Corporation ("OVEC") entitlement after FES filed for bankruptcy; and (2) how the OVEC plants are committed into the PJM day-ahead energy market. In my voicemail message, I asked Mr. Nourse to call me to discuss a date for the deposition. Mr. Nourse never returned my phone call.

3. The deposition notice proposed to take the deposition of AEP witnesses on January 13, 2021 or such other date as mutually agreed upon by OCC and AEP.
4. AEP Ohio filed a Motion for Protective Order on January 11, 2021. I cancelled the deposition scheduled for January 13, 2021, to allow more time to resolve the matter without resorting to a motion to compel discovery.
5. I called Mr. Nourse on January 14, 2021 and left a voicemail message to inform him that OCC would still like to proceed with the deposition of an AEP Ohio witness, and asking him to supply a date when he and the witness would be available. Mr. Nourse responded by email that he was unwilling to supply any dates because AEP Ohio was opposing OCC's request to take a deposition.

STATE OF OHIO)
)
COUNTY OF FRANKLIN) ss

The undersigned, being of lawful age and duly sworn by oath, hereby certifies, deposes and states the following:

I have caused to be prepared the attached written affidavit for OCC in the above-referenced docket. This affidavit is true and correct to the best of my knowledge, information and belief.

/s/ John Finnigan
John Finnigan, Affiant

Sworn to and subscribed by affiant via Microsoft Teams meeting this 17th day of March, 2021.

Debra Jo Bingham
Notary Public



DEBRA JO BINGHAM
Notary Public
State of Ohio
My Comm. Expires
June 13, 2025

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3/17/2021 11:07:26 AM

in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

Summary: Motion Joint Motion to Compel Depositions of AEP by the Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Patricia J Mallarnee on behalf of Finnigan, John