**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

# REPLY MEMORANDUM IN SUPPORT OF JOINT MOTION TO COMPEL DEPOSITION OF AEP (DEPOSITION ON COAL PLANT CHARGES) BY OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

## I. INTRODUCTION

Ohio Power Company ("AEP") is using tactics of delay and a waste of resources (and revealing its misplaced sense of entitlement to subsidies from consumers) by opposing an ordinary case preparation tool, a deposition, regarding charges collected from consumers to subsidize its uneconomic OVEC coal plants. This proceeding involves an audit of those subsidies that AEP charged to and collected from its customers for AEP's purported 2018 and 2019 costs for the OVEC coal plants, which were collected through a rider approved by the Public Utilities Commission of Ohio ("PUCO"). This subsidy to bailout the dirty coal plants (one in Ohio and one in Indiana) was authorized by the PUCO prior to the effective date of H.B. 6.

The question the PUCO must answer is: were the OVEC plants prudently managed? The PUCO auditors' reports in the AEP and Duke Energy Ohio, Inc. ("Duke") OVEC cases strongly suggest that they were not prudent because the plants were designated as "must-run" for the entire year, which would tend to increase the subsidy charges to consumers. In fact, the must-run

strategy caused losses of approximately $70 million for the customers of AEP, Duke, and The Dayton Power & Light Company ("DP&L") in 2019.[1]

When framing the issues, the PUCO explicitly stated, "[a]ny conclusions, results, or recommendations formulated by LEI [London Economics International] may be examined by any participant to these proceedings."[2] The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") sought to depose an AEP witness about the must-run offer strategy addressed in LEI's [London Economics International] audit report. A deposition is also needed to determine whether AEP's customers were adversely impacted by AEP's decision to accept a share of the FirstEnergy Solutions' ("FES") OVEC entitlement after FES filed for bankruptcy.

Yet, AEP wants to prevent the intervening parties from deposing utility witnesses to obtain more information about the consumer issues raised in the audit report and charges collected from customers. Despite the relevancy of these issues and the significant cost to customers, AEP continues to resist a deposition. OCC and OMAEG need the PUCO to promptly grant their motion to compel AEP to produce a witness for deposition. Allowing the deposition to go forward, which is a discovery right afforded to intervenors under law and rule, will facilitate OCC and OMAEG's preparation of comments and better inform the PUCO of the matters in this case.

Accordingly, the PUCO should reject AEP's efforts to block the depositions and allow the parties to go forward with their investigation so as to better inform the PUCO's decision in this case

[1] Runnerstone, LLC, *Ohio's Costly – and Worsening – OVEC Situation* at 1 (Nov. 12, 2020), available at: https://www.ohiomfg.com/wp-content/uploads/Ohios-Worsening-OVEC-Situation-11.9.2020-Final.pdf.

[2] Entry at ¶ 14 (March 11, 2020).

## II. BACKGROUND

How the OVEC plants were committed into the PJM Day-Ahead Energy Market is an important issue in not just this proceeding, but also in in the related DP&L and Duke OVEC Audit Cases (Case No. 20-167-EL-RDR and Case No. 20-165-EL-RDR, respectively). The auditor in the AEP OVEC Audit Case concluded that "some of the time, the PJM energy price did not cover fuel and variable cost."[3] And the auditor of AEP recommended that "OVEC reconsider its 'must-run' offer strategy."[4]

The auditor's too-polite words support that in the three AEP, Duke and DP&L (OVEC) Audit Cases, the PUCO should consider whether the utilities are acting in the best interests of consumers to minimize the coal subsidies that the PUCO enabled.

Moreover, the PUCO has asserted that it will closely scrutinize OVEC's operations to ensure OVEC's practices are "in the best interest of retail [customers]."[5] The PUCO has also stated that when reviewing OVEC costs it will hold the utilities and OVEC to the following standard:

> Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the plants is not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.[6]

The PUCO adopted this standard of review in response to a point that PJM raised in an *amicus* brief. More specifically, PJM urged the PUCO to hold OVEC and the utilities (AEP, Duke and DP&L) to the same conduct expected of a competitive generator. PJM noted in its

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[3] *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018* Case No. 18-1004-EL-RDR Audit Report at 9 (Sept. 16, 2020).

[4] *Id.*

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

[6] *Id.*

*amicus* brief that the PUCO would need to follow this standard to make certain that utilities would build new power plants in Ohio because:

> [T]he PUCO Oversight Provision, more than any other in the Stipulation, has the greatest potential to impact the effectiveness of the wholesale market in Ohio for stimulating new investment. Moreover, since the Commission has stated that the PJM marketplace remains the primary vehicle it intends to utilize to attract and incent new generation resources, how this Commission implements this provision is critically important to whether those Ohio-specific goals can be achieved.[7]

The cost of producing electricity from the two AEP/OVEC coal plants is much higher than the cost of electricity obtained from competitive wholesale auctions. And that significant above-market cost is subsidized for the benefit of AEP, Duke and DP&L who own the plants, through charges to consumers, per a PUCO-approved nonbypassable charge that is part the utilities' standard offers. OCC and OMAEG need to depose an AEP witness to explore whether the plants were operated in accordance with the same standards that a competitive generator would have operated.

Another issue is whether AEP customers were adversely impacted by AEP's decision to accept a share of the FES' OVEC entitlement when FES filed for bankruptcy. The auditor in the AEP OVEC Audit Case noted that "the FirstEnergy Solutions bankruptcy impacted OVEC and AEP Ohio charges."[8] OCC and OMAEG need to depose an AEP witness to resolve this issue and determine whether any costs to customers should be disallowed.

AEP has not substantiated any benefits to customers for paying the coal subsidies. For example, in April 2018, AEP persuaded the PUCO to extend OVEC cost collection through

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[7] *In re Ohio Power PPA Rider,* Case No. 14-1693-EL-RDR Brief for *Amicus Curiae* PJM Interconnection, L.L.C. at 4 (Feb. 1, 2016).

[8] *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 Audit Report at 16 (Sept. 16, 2020).

2024, based on the argument that the OVEC plants provide customers with a price hedge and the plants should be ***profitable*** by the end of AEP's purchase power agreement with OVEC.[9] Yet ***that same month***, FirstEnergy Solutions asked the U.S. Bankruptcy Court for permission to reject the OVEC purchase power agreement because it was projected to result in a ***$268 million loss*** through the end of the purchase power agreement.[10] Consequently, the PUCO and parties in the OVEC Audit Cases require additional information to verify whether the OVEC plants were operated prudently and in the best interests of customers.

## III. ARGUMENT

### A. Parties such as OCC and OMAEG have a right to ample discovery under law, including cases where no evidentiary hearing has been scheduled.

As OCC and OMAEG noted in their Motion to Compel, 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 OCC and OMAEG's ample discovery rights afforded by statute, AEP asserts that intervening parties have no right to depose witnesses in a PUCO case where no evidentiary hearing has been scheduled.[12] This view is contrary to the PUCO's rules on depositions. Ohio Adm. Code 4901-1-21 states that "Any party to *a pending commission proceedi*ng may take the testimony of any other party, or person*** with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code." This is a pending PUCO

[9] *In re AEP ESP III,* Case No. 16-1852-EL-SSO Opinion and Order (Apr. 25, 2018).

[10] *In re FirstEnergy Solutions Corp., et al.,* Case No. 18-70575 Declaration of Kevin T. Warvell (Apr. 1, 2018), available at: 140048357110-rep-0104011853 (1).pdf.

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

[12] Memorandum Contra at 5.

proceeding and the PUCO has ordered an audit, commencing the proceeding. The audit is subject to review and adjudication. Contrary to AEP's assertion otherwise, there is no prohibition on conducting a deposition in a pending PUCO proceeding that does not have a scheduled hearing.

And yet, AEP ignores the PUCO deposition rule and persists in opposing the deposition without any case law to support its argument.[13] The reason AEP cites to no cases is because the PUCO has not adopted AEP's restrictive view, which would preclude discovery by deposition in this pending PUCO proceeding

In fact, the PUCO has allowed depositions in cases where no evidentiary hearing has been scheduled. The most recent example is a case exploring Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, "FirstEnergy") potential political and charitable spending in support of H.B. 6. In that case, intervening parties deposed FirstEnergy affiant Mr. Santino Fanelli even though no evidentiary hearing had been scheduled.[14]

AEP's argument that the PUCO does not allow depositions in such cases is without merit and contrary to PUCO rule and precedent. AEP's objection is a delay tactic and a waste of resources. The PUCO should put a stop to these utility tactics. The PUCO should therefore reject this argument.

[13] Memorandum Contra at 1-5.

[14] *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 20-1502-EL-UNC Amended Notice to Take Deposition and Request for Production of Documents by the Office of the Ohio Consumers' Counsel (Jan. 27, 2021).

### B. Intervening parties have a right to depose witnesses and the utility is not entitled to force intervening parties to use written discovery requests in lieu of depositions.

AEP next argues that intervening parties should not be entitled to take depositions because AEP is willing to respond to written discovery requests.[15] Once again, AEP cites to no cases to support this novel proposition that the utility can select the method of discovery to be used by intervening parties, which is contrary to established PUCO rule and precedent.

AEP's view is also contrary to the PUCO discovery rules. Under O.A.C. 4901-1-16(B), "[d]iscovery may be obtained through interrogatories, requests for production of documents and things or permission to enter upon land or other property, depositions, and requests for admissions." These words make clear that it is not an either/or approach as AEP suggests. And this PUCO rule goes on to state that the frequency of using these discovery methods is not limited (unless the PUCO otherwise orders).

An example as to how discovery should proceed in these cases is the pending Duke OVEC Audit Case. In that case, the PUCO hired an independent auditor to examine the Duke OVEC charges. OCC and OMAEG intervened in that case and issued written discovery requests. Subsequently, OCC and OMAEG also took the deposition of John Swez, a Duke witness, and Duke voluntarily submitted to the deposition.[16]

AEP is directing intervenors as to how AEP believes they should conduct their case and conduct discovery, but AEP's proposed, or desired case strategy and discovery methods are irrelevant and not in the best interest of customers. Intervenors' case strategy and choice of discovery methods is their choice, not AEP's. AEP's argument that it should be able to require

[15] Memorandum Contra at 5.

[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).

intervening parties to use written discovery in lieu of depositions is baseless and contrary to PUCO rule and precedent. The PUCO should therefore reject this argument.

### C. Seeking to depose a company witness is a lawful and very ordinary exercise of intervening parties' discovery rights and does not amount to unlawful annoyance and undue burden.

Finally, AEP argues that OCC and OMAEG are engaging in unlawful "annoyance and undue burden" in seeking to depose an AEP witness.[17] AEP's unfortunate attitude about customers inquiring into the charges that they have paid to a regulated entity is what is annoying and burdensome. AEP's attitude is arrogant and speaks to AEP's sense of entitlement (and lack of gratitude) for the subsidies that it makes its customers pay for its coal plant losses. AEP cites to no cases to support this astounding proposition and AEP's argument is contrary to established PUCO precedent.

As OCC and OMAEG noted in their Motion to Compel, depositions are often an important method for attorneys to obtain information. They allow for more thorough and probing examination 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 wants the PUCO to prevent the intervenors from taking depositions. Accepting AEP's refusal to submit to a deposition would not afford OCC and OMAEG their ample rights to discovery to which they are entitled by law and rules. The PUCO should therefore reject AEP's argument and allow the deposition to proceed.

[17] AEP Memorandum Contra at 1.

## IV. CONCLUSION

For the reasons discussed above, the PUCO should grant OCC and OMAEG's Motion to Compel and require AEP to produce a witness for deposition.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Memorandum in Support of Joint Motion to Compel was served on the persons stated below via electric transmission this 8th day of April 2021.

*/s/ John Finnigan*
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**Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR**

Summary: Reply Reply Memorandum in Support of Joint Motion to Compel Deposition of AEP (Deposition on Coal Plant Charges) 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