

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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Pursuant to Ohio Adm.Code 4901-1-12 and 4901-1-24(A)(4), Ohio Power Company (“AEP Ohio” or the “Company”) respectfully moves the Public Utilities Commission of Ohio (“Commission”) to issue a protective order with regard to the Notice to Take Depositions and Requests for Production of Documents served by The Office of the Ohio Consumers’ Counsel (“OCC”) on November 19, 2021 (“Notice of Deposition”). OCC’s Notice of Deposition asks AEP Ohio to produce witnesses for deposition on dozens of topics, and even more categories of documents. AEP Ohio has agreed with OCC to produce its hearing witness(es) for deposition after it has filed their testimony. But AEP Ohio and OCC have reached an impasse on the scope of the document requests and deposition topics and the Company seeks an order providing that the Company need not provide testimony or produce documents relating to matters that fall outside the scope and purpose of these audit proceedings. The reasons supporting this motion are provided in the attached Memorandum in Support and the attached affidavit of counsel.<sup>1</sup>

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<sup>1</sup> Due to COVID-19 procedures, AEP Ohio uses a new virtual notary service to finalize affidavits and similar documents; the person responsible was not available today, so the Company plans to docket a notarized copy of the attached (already final) affidavit on Monday December 6, 2021.

Respectfully submitted,

/s/ Steven T. Nourse

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**Counsel for Ohio Power Company**

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The purpose of Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR is to review the “prudence and performance” of expenses recovered through Ohio Power’s Power Purchase Agreement (“PPA”) Rider for calendar years 2018 and 2019. *In re the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case Nos. 18-1004-EL-RDR *et al.* (“AEP Ohio PPA Rider Audit Cases”), Entry ¶¶ 4, 7 (Oct. 5, 2021). In particular, the annual audits are intended to allow the Commission to “review the accuracy and appropriateness of the rider’s accounting and the prudence of AEP Ohio’s decisions and actions” during the audit periods. *In re Application Seeking Approval of Ohio Power Co.’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.* (“PPA Rider Case”), Opinion and Order at 90 (Mar. 31, 2016); *PPA Rider Case*, Second Entry on Rehearing ¶ 178 (Nov. 3, 2016) (confirming its prior order with regard to the annual audit). The Commission has set these matters for hearing on January 12, 2022, and set deadlines for filing direct testimony of December 22, 2021 (for AEP Ohio) and December 29, 2021 (for Staff and intervenors).

OCC’s Notice of Deposition would require AEP Ohio to provide testimony on dozens of topics, and produce even more categories of documents. More specifically, the Notice of Deposition includes numerous deposition topics and document requests that go well beyond the appropriate scope of these proceedings. AEP Ohio asks for the Commission’s protection from these irrelevant OCC discovery requests.

### **II. LAW AND ARGUMENT**

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[,]” that “[c]ertain matters not be inquired into[,]” or that “[t]he scope of discovery be limited to certain matters.” Ohio Adm.Code 4901-1-24(A). Here, AEP Ohio requests that the Commission order that prohibits OCC from seeking testimony or requesting documents on the topics discussed below, all of which clearly exceed the scope of these proceedings.

**A. OCC should not be permitted to conduct discovery regarding topics outside the scope of these proceedings**

The Commission’s rules permit parties to a Commission proceeding to “obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” Ohio Adm.Code 4901-1-16(B). OCC has obtained copies of all of the Auditor’s data requests and the Company’s responses, as well as conducted its own extensive discovery in this case. But OCC’s Notice of Deposition seeks further discovery on a few matters that are entirely irrelevant to these audit proceedings, including the inclusion of the OVEC contract in the PPA (which this Commission approved in a prior proceeding); American Electric Power’s description of the OVEC contract in its public reporting; and the participation of AEP Ohio’s affiliates in the PJM or MISO markets. None of these topics is relevant to the prudency audit of AEP Ohio’s PPA Rider, and thus none of these topics is a legitimate subject of discovery here.

**1. AEP Ohio’s decision to enter into the “OVEC contract”**

OCC’s Notice of Deposition indicates that OCC intends to use these audit proceedings to relitigate the Commission’s decision to include the OVEC power purchase agreement (“PPA”) in the PPA Rider. The Notice states that OCC intends to ask questions regarding, and is requesting documents relating to, “Any analysis of competitive bidding process that AEP used before

selecting the OVEC contract to be provided for consumers under the PPA Rider” and “Any analysis performed by AEP to show that the OVEC contract would be the least-cost resource available to serve consumers before selecting the OVEC contract to be provided for consumers under the PPA Rider.” (Notice of Deposition, Matter ## 5-6 and Document Request ## 5-6.)

The inclusion of the OVEC PPA in the PPA Rider is not the subject of this proceeding. It was the subject of the *PPA Rider Case*, where the Commission explicitly approved it more than five years ago. *See PPA Rider Case*, Second Entry on Rehearing ¶ 57 (Nov. 3, 2016); *see also id.* at ¶ 62 (“In the PPA Order, \* \* \* the Commission \* \* \* approved the inclusion of the OVEC PPA in the PPA rider.”) and ¶ 63 (“we approve, on rehearing, AEP Ohio’s request to \* \* \* include only the OVEC PPA in the PPA rider”). OCC unsuccessfully opposed the inclusion of the OVEC PPA in the PPA Rider through multiple applications for rehearing (*see, e.g., PPA Rider Case*, Fifth Entry on Rehearing ¶¶ 50-52 (Apr. 5, 2017)) and ultimately at the Supreme Court of Ohio, which affirmed the Commission’s decision. *See In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698. Thus, these audit proceedings correctly assume the inclusion of the OVEC PPA in the PPA Rider as a given. *See* Entry ¶ 5 (Jan. 15, 2020) and Request for Proposal No. RA20-PPA-1 at pp. 1-4. OCC should not be permitted to use the Commission’s discovery process in these proceedings to relitigate these settled issues.

## **2. The actions of AEP Ohio’s parent company and affiliates**

OCC’s Notice of Deposition also indicates that it intends to ask questions regarding, and is requesting documents relating to, “How the OVEC plants or Inter-Company Power Agreement should be reflected in the AEP Sustainability Report.” (Notice of Deposition, Matter # 23 and Document Request # 27.) OCC does not define the term “AEP Sustainability Report,” but it appears OCC is referring to a report issued by AEP Ohio’s ultimate parent company, American Electric Power (“AEP”), that describes AEP’s economic, environmental, and social policies and

performance. *See* AEP Ohio, Environment, <https://www.aepohio.com/clean-energy/environment/>. AEP is not the subject of these proceedings. Nor does the AEP Sustainability Report have anything to do with the prudency review which is the purpose of these proceedings. The Commission should not allow OCC to use these proceedings to conduct discovery into the writing and editing decisions of AEP Ohio's ultimate parent company.

Next, OCC's Notice requests that AEP Ohio testify regarding, and produce copies of, "the policy or procedure relating to committing plants into the PJM or MISO Day-Ahead Energy Market that Ohio Power Company or any of its affiliates follows for any plants it owns in PJM or MISO." (Notice of Deposition, Matter #16 and Document Request # 22.) Similarly, OCC's Notice requests testimony regarding, and copies of, "Any financial analysis of projected PJM or MISO Energy Market revenues vs. variable operating cost plus shut-down and start-up costs that Ohio Power Company or any of its affiliates currently use to decide how to commit plants into the PJM or MISO Day-Ahead Energy Market." (*Id.*, Matter # 21 and Document Request # 25.) AEP Ohio does not own any plants in PJM or MISO, aside from its share of the OVEC power participation benefits and requirements. Moreover, AEP Ohio's affiliates are not parties to this proceeding, and the plants they own are not the subject of these proceedings. Even assuming such information and documents "are in the possession, custody, or control" of AEP Ohio (*see* Ohio Adm.Code 4901-1-20(A)(1)) – and AEP Ohio does not believe they are – the PJM or MISO market participation strategies and decisions of AEP Ohio's affiliates is completely irrelevant to these PPA Rider audit proceedings, and the Commission should not allow OCC to conduct discovery on those topics.

**B. OCC should not be permitted to conduct discovery regarding AEP Ohio's actions after the audit period**

OCC also should not be permitted to conduct discovery regarding matters that post-date the 2018-2019 audit period. In an audit proceeding, generally speaking, “[t]he Commission has historically only permitted a review of matters during the audit period involved in [the] case.” *In re Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio*, Case No. 05-219-GA-GCR, Entry, ¶ 10-11 (July 28, 2006). *Cf. In re Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-101-EL-EFC, Opinion and Order, 1994 Ohio PUC LEXIS 393, \*95-96 (May 25, 1994) (declining to review the appropriateness of the retirement of a specific dragline because it was “a matter outside the review period of the audits conducted in this case.”). Further, such matters will be covered in future audits and rehashing in multiple audit proceedings is inefficient, redundant and litigious.

Consequently, the Commission has not permitted discovery relating to matters outside the audit period. *See In re Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power and Light Company*, Case No. 85-07-EL-EFC, Entry, 1985 Ohio PUC LEXIS 806, \*3-5 (September 3, 1985) (granting in part and denying in part a motion to compel filed by OCC, and holding that “[t]he attorney examiner \* \* \* will not order the company to provide data outside the audit period”). Consistent with the Commission’s prior holdings, the Commission should not permit discovery of matters outside the audit period involved in these proceedings (2018-2019) either. Factual questions concerning AEP Ohio’s actions during 2018 and 2019 may not be explored with the hindsight of reports produced, information received, policies developed, or rulemakings proposed in 2020 or 2021.

## **1. Deposition topics relating to matters outside the audit period**

The list of topics on which OCC has requested examination include several topics for which OCC did not specify or otherwise indicate a time period. AEP Ohio requests that deposition on any of the following topics, and on any other topics for which no time period is specified or otherwise indicated, be limited to the period up to and including the end of the second audit period, December 31, 2019:

1. Any analysis showing the projected costs or revenues from the OVEC contract that Ohio Power Company would collect from or credit to consumers under the PPA Rider.
2. Any analysis showing any comparison between: (a) the projected costs or revenues from the OVEC contract that AEP would collect from or credit to consumers under the PPA Rider; and (b) projected PJM market prices.
9. Any analysis showing the cost for improvements to the OVEC plants needed to comply with the U.S. EPA's Coal Combustion Residual rules.
10. Any analysis showing the cost for improvements to the OVEC plants needed to comply with the U.S. EPA's Effluent Limitation Guideline rules.
17. Discussions with OVEC staff regarding the bid and offer strategies into the PJM or MISO Day-Ahead Energy Markets.
18. Discussions with OVEC staff regarding the bid and offer strategies into the PJM or MISO Capacity Markets.

In comparison, several of the other topics on which OCC is requesting examination *explicitly* relate, either in part or in whole, to analyses, discussions, and decisions occurring after the audit periods. AEP Ohio requests that the Commission prohibit OCC from questioning AEP Ohio's witnesses regarding any of the following topics, or any other topics listed in OCC's Notice of Deposition, to the extent they relate to analyses, discussions, and decisions occurring from January 1, 2020, "through the present date" and/or "currently":



7. Discussions at any OVEC board of directors meeting from January 1, 2018 through the present date where the retirement of the OVEC plants was discussed.
8. Discussions at any OVEC board of directors or operating committee meeting from January 1, 2018 through the present date where seasonal operation of the OVEC plants was discussed.
11. Discussions at any OVEC board of directors meeting from January 1, 2019 through the present date involving the cost for improvements to the OVEC plants needed to comply with the U.S. EPA's Coal Combustion Residual rules or Effluent Limitation Guideline rules.
12. Any resolution of the OVEC board of directors from January 1, 2019 through the present date approving capital investment for improvements to the OVEC plants needed to comply with the U.S. EPA's Coal Combustion Residual rules or Effluent Limitation Guideline rules.
13. Discussions at any OVEC board of directors meeting from January 1, 2018 through the present date involving the possible sale or transfer of any owner's ownership interest in OVEC or contractual entitlement under the Inter-Company Power Agreement.<sup>2</sup>
14. The OVEC policy or procedure from January 1, 2018 through the present date relating to committing the OVEC plants into the PJM Day-Ahead Energy Market.
15. Discussions at any OVEC board of directors meeting or operating committee meeting from January 1, 2018 through the present date involving the OVEC policy or procedure relating to committing the OVEC plants into the PJM Day-Ahead Energy Market.
20. Any financial analysis of projected PJM Energy Market revenues vs. OVEC variable operating cost plus shut-down and start-up costs that OVEC currently uses to decide how to commit the OVEC plants into the PJM Day-Ahead Energy Market.

## **2. Document requests relating to matters outside the audit period**

Like the list of deposition topics in OCC's Notice of Deposition, the list of documents that OCC has requested AEP Ohio to produce include several document categories for which

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<sup>2</sup> The Company also objects to this request as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

OCC did not specify or otherwise indicate a time period. Yet documents created after the end of the audit periods, and relating to OVEC's operations after the audit periods, are irrelevant to these proceedings and objectionable for the reasons explained above. AEP Ohio requests that the Commission protect it from producing documents responsive to any of the following requests, or to any other document requests for which no time period is specified or otherwise indicated, to the extent that the requested documents were created during, and relate to, the period after December 31, 2019:

1. Any analysis showing the projected costs or revenues from the OVEC contract that AEP would collect from or credit to consumers under the PPA Rider.
2. Any analysis showing any comparison between: (a) the projected costs or revenues from the OVEC contract that AEP would collect from or credit to consumers under the PPA Rider; and (b) projected PJM market prices.
13. Any analysis showing the cost for improvements to the OVEC plants needed to comply with the U.S. EPA's Coal Combustion Residual rules.
14. Copies of any analysis showing the cost for improvements to the OVEC plants needed to comply with the U.S. EPA's Effluent Limitation Guideline rules.
20. Copies of communications with OVEC staff regarding the bid and offer strategies into the PJM or MISO Day-Ahead Energy Markets.
21. Copies of communications with OVEC staff regarding the bid and offer strategies into the PJM or MISO Capacity Markets.

Similarly, several of OCC's document requests *specifically* request documents created after (and not otherwise relating to) the audit periods. These requests specify categories of documents created "during the past number of years" or "through the present date," or relate to OVEC's operations "currently." As stated above, documents created after the end of the audit periods, and/or relating to OVEC's operations after the end of the audit periods, are irrelevant to these proceedings. Accordingly, AEP Ohio requests that the Commission protect it from

producing documents responsive to any of the following requests, and any other similarly phrased document requests, to the extent that the requested documents were created from January 1, 2020, “through the present date” and/or relate to OVEC’s “current[ ]” operations:

7. Any retirement study for the OVEC plants or analysis of retiring the OVEC plants during the past ten years.
8. Any depreciation study for the OVEC plants during the past ten years.
9. Any study of possible seasonal operation of the OVEC plants or analysis of seasonal operation of the OVEC plants during the past five years.
10. Copies of minutes from any OVEC board of directors meeting or operating committee meeting from January 1, 2018 through the present date where the retirement of the OVEC plants was discussed.
11. Copies of minutes from any OVEC board of directors meeting or operating committee meeting from January 1, 2018 through the present date where any depreciation study of the OVEC plants was discussed.
12. Copies of minutes from any OVEC board of directors meeting or operating committee meeting from January 1, 2018 through the present date where seasonal operation of the OVEC plants was discussed.
15. Copies of minutes from any OVEC board of directors meeting from January 1, 2019 through the present date where the directors discussed the cost for improvements to the OVEC plants needed to comply with the U.S. EPA’s Coal Combustion Residual rules or Effluent Limitation Guideline rules.
16. Copies of any resolution of the OVEC board of directors from January 1, 2019 through the present date approving capital investment for improvements to the OVEC plants needed to comply with the U.S. EPA’s Coal Combustion Residual rules or Effluent Limitation Guideline rules.
17. All documents relating to any discussions at any OVEC board of directors meeting from January 1, 2018 through the present date involving the possible sale or transfer of any owner’s ownership interest in OVEC or contractual entitlement under the Inter-Company Power Agreement.<sup>3</sup>

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<sup>3</sup> The Company also objects to this request as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

18. Copies of any OVEC policy or procedure from January 1, 2018 through the present date relating to committing the OVEC plants into the PJM Day-Ahead Energy Market.
19. Copies of any minutes from any OVEC board of directors meeting or operating committee meeting from January 1, 2018 through the present date involving any discussion of the OVEC policy or procedure relating to committing the OVEC plants into the PJM Day-Ahead Energy Market.
24. A sample copy of any financial analysis of projected PJM Energy Market revenues vs. OVEC variable operating cost plus shut-down and start-up costs that OVEC currently used to decide how to commit the OVEC plants into the PJM Day-Ahead Energy Market.
28. A copy of the annual report for OVEC for 2021.
29. A copy of the re-offering circular of Ohio Air Quality Development Authority bonds relating to OVEC dated September 16, 2021.

### **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 may produce its hearing witnesses for deposition on December 23, 2021. AEP Ohio also asks that the Commission prohibit OCC from seeking discovery regarding the matters listed above that are outside the scope of these audit proceedings.

Respectfully submitted,

/s/ Steven T. Nourse

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**Counsel for Ohio Power Company**

## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Motion for Protective Order* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 3rd day of December, 2021, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

## **EMAIL SERVICE LIST**

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**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 filed today regarding the Notice of Deposition docketed on November 19, 2021.

3. I corresponded with counsel for The Office of the Ohio Consumers’ Counsel (OCC), John Finnigan, regarding the Notice of Deposition over the course of three days ending on December 3, 2021.

4. Through that correspondence, I described AEP Ohio’s objections to presenting witnesses to testify regarding, or producing documents relating to, topics outside the scope of these audit proceedings, including testimony or documents on the inclusion of the Ohio Valley Electric Company (OVEC) contract in the PPA, American Electric Power’s description of the OVEC contract in its public reporting, and the participation of AEP Ohio’s affiliates in the PJM or MISO markets, or any matters that post-date the 2018-2019 audit period.

5. Subject to finalizing the details of the deposition(s), the Company and OCC have generally resolved the issue regarding the witness(es) to be presented for deposition and the timing of the deposition(s).

6. But the Company and OCC continue to disagree about the scope of the deposition(s) and the documents to be produced for the deposition, so the parties agree they have reached an impasse on those issues.

7. Given the above, I believe AEP Ohio has exhausted all reasonable means of resolving its differences with OCC regarding discovery in this proceeding and the Company is filing a Motion for Protection as a means to preserve its objections and resolve the areas of dispute.

FURTHER AFFIANT SAYETH NAUGHT.

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Steven T. Nourse

Sworn to before me and subscribed in my presence this 3 day of December, 2021.

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Notary Public

**This foregoing document was electronically filed with the Public Utilities  
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**in**

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

Summary: Motion Motion for Protective Order electronically filed by Mr. Steven T.  
Nourse on behalf of Ohio Power Company