

**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. )

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**JOINT MEMORANDUM CONTRA OHIO POWER COMPANY'S  
MOTION FOR PROTECTIVE ORDER  
OF  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP  
AND  
THE KROGER CO.**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) initiated the above-referenced proceeding to review whether the costs that Ohio Power Company (AEP) charged its customers to subsidize two coal plants (one of which is in Indiana) were prudent and in customers' best interests.<sup>1</sup> But AEP and the other utilities are going to great lengths to thwart the Commission's review and parties' participation in that review.<sup>2</sup> The utilities are attempting to shield from discovery parties' access to ordinary discovery. One must wonder why. Why would the utilities want to limit discovery and prevent customers from reviewing the prudence and reasonableness of the costs passed onto them and the actions taken by regulated utilities? If AEP's decisions were

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<sup>1</sup> See the Commission's Request for Proposal No. RA20-PPA-1 at 4 (January 15, 2020).

<sup>2</sup> See, e.g., AES Ohio's Motion to Quash the Subpoena, Case No. 20-165-EL-RDR (November 19, 2021); AES Ohio, Duke Energy Ohio, Inc. and AEP's Motion to Quash the Subpoena, Case Nos. 18-1004-EL-RDR, et al.; Case No. 20-165-EL-RDR; Case No. 20-167-EL-RDR (December 1, 2021); OVEC's Motion to Quash the Subpoena, Case Nos. 18-1004-EL-RDR, et al.; Case No. 20-165-EL-RDR; Case No. 20-167-EL-RDR (December 13, 2021).

prudent and the costs passed onto customers were prudently incurred and in the best interest of customers, what does AEP have to hide?

On January 15, 2020, the Commission directed the Staff of the Commission to issue a request for proposal for audit services to assist the Commission in its review of AEP's Power Purchase Agreement Rider (PPA Rider) for the period of January 1, 2018 through December 31, 2019.<sup>3</sup> Rider PPA passes on costs to customers associated with two aging and uneconomic coal plants that are co-owned by AEP and other utilities and operated by the Ohio Valley Electric Corporation (OVEC) pursuant to the Intercompany Power Agreement (ICPA).<sup>4</sup> On September 16, 2020, London Economics International, LLC (LEI or the Auditor) filed its Audit Report and made several recommendations to the Commission.<sup>5</sup>

On January 11, 2021, the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger) intervened in the above-captioned proceeding.<sup>6</sup> Thereafter on November 12, 2021 and December 3, 2021, OMAEG and Kroger filed Joint Comments and Joint Reply Comments respectively, advocating that the Commission should disallow the collection of any OVEC costs during the audit period that were imprudent or not in the best interests of customers.<sup>7</sup>

On November 19, 2021, consistent with Ohio law that grants parties "ample rights to discovery" and the Commission's rules that are intended to "aid full and reasonable discovery by all parties,"<sup>8</sup> the Office of the Ohio Consumers' Counsel (OCC) served AEP with a Notice to Take

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<sup>3</sup> Entry at ¶ 7 (January 15, 2020).

<sup>4</sup> ICPA, <https://www.sec.gov/Archives/edgar/data/73986/000000490406000041/x10a2.htm>.

<sup>5</sup> Audit Report (September 16, 2020).

<sup>6</sup> See OMAEG's Motion to Intervene (January 11, 2021); Kroger's Motion to Intervene (January 11, 2021).

<sup>7</sup> See OMAEG and Kroger's Joint Comments at 2 (November 12, 2021); OMAEG and Kroger's Joint Reply Comments at 3 (December 3, 2021).

<sup>8</sup> R.C. 4903.082.

Depositions and Requests for Production of Documents.<sup>9</sup> OMAEG and Kroger plan to participate in the depositions. On December 3, 2021, in an attempt to limit the scope of the Commission’s review and parties’ participation in the proceeding, AEP filed a Motion for Protective Order (Motion).<sup>10</sup> In accordance with Ohio Adm. Code 4901-1-12(B)(1), OMAEG and Kroger hereby file their Joint Memorandum Contra AEP’s Motion.

The goal of the discovery rules is to “encourage prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in [Commission] proceedings.”<sup>11</sup> That is exactly what the parties seek through a deposition of an AEP representative: discovery during the prehearing phase of the proceeding in order to adequately participate in the proceeding, including preparing for the upcoming January 12, 2022 evidentiary hearing.<sup>12</sup>

The Commission’s rules clearly recognize that parties “may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding [as long as] the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>13</sup> Such 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.”<sup>14</sup> Notably, “[t]he frequency of using these discovery methods is not limited”<sup>15</sup> unless the “party or person from whom discovery is sought” shows that a protective order is “necessary

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<sup>9</sup> See OCC’s Notice to Take Depositions and Requests for Production of Documents (November 19, 2021).

<sup>10</sup> See AEP’s Motion December 3, 2021.

<sup>11</sup> Ohio Adm. Code 4901-1-16(A).

<sup>12</sup> See Entry at ¶ 24 (October 5, 2021).

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

to protect [such] party or person from annoyance, embarrassment, oppression, or undue burden or expense”.<sup>16</sup>

AEP’s Motion failed to explain how one deposition on topics directly related to the OVEC costs being passed on to customers through Rider PPA would be unduly annoying, embarrassing, oppressive, burdensome, or expensive. Additionally, any potential burden that AEP may face is minimal when viewed in relation to the Commission’s review itself. Consequently, AEP’s Motion does not satisfy the requirements of Ohio Adm. Code 4901-1-24.

As explained further below, the Commission should deny AEP’s Motion and prevent AEP from limiting the Commission’s review and parties’ participation therein.

## **II. ARGUMENT**

### **A. AEP Failed to Establish that One Deposition on Topics Related to the OVEC Costs that it Assesses Customers Through Rider PPA Would Result in Annoyance, Embarrassment, Oppression, or Undue burden or Expense.**

AEP cannot demonstrate that the Deposition Noticed and Requests for Production of Documents would result in annoyance, embarrassment, oppression, or undue burden or expense. As discussed above, R.C. 4903.082 provides that “all parties and intervenors shall be granted ample rights of discovery” in Commission proceedings and that the “rules of the public utilities commission should...aid full and reasonable discovery by all parties.” Moreover, under Ohio Adm. Code 4906-1-16(B), “any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding” and “[i]t 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.” Such discovery “may be obtained through interrogatories, *requests for the production of*

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<sup>16</sup> Ohio Adm. Code 4901-1-24(A).

*documents* and things or permission to enter upon land or other property, *depositions*, and requests for admission.”<sup>17</sup>

In its Motion, AEP argued that certain information sought through the Deposition Noticed and Requests for Production of Documents would be “completely irrelevant” to the above-captioned proceeding simply because the information relates to AEP’s parent company and affiliates or the information sought was from outside of the audit period.<sup>18</sup>

Ohio R. Evid. 401 defines “relevant evidence” as “evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (Emphasis added). Ohio courts have recognized that this standard “produce[s] a low threshold of admissibility, which ‘reflect[s] the policy favoring the admission of relevant evidence for the trier of fact to weight.’” *State v. West*, 2017-Ohio-4055, ¶ 77, 91 N.E.3d 365, 379 (*State v. Kehoe*, 133 Ohio App.3d 591, 606, 729 N.E.2d 431 (12th Dist. 1999)).

It is indisputable that the above-captioned proceeding pertains to AEP’s recovery of costs associated with two aging coal plants operated by OVEC and assessed to customers and collected through a Commission-approved rider mechanism.<sup>19</sup> And AEP and its affiliates have the largest ownership interests in OVEC and have oversight responsibilities of the same OVEC coal plants at issue in this proceeding pursuant to the ICPA.<sup>20</sup> The Audit Report also notes, “in addition to AEP Ohio’s contract for OVEC generation through the ICPA, AEP as the parent company of AEP Ohio has other points of integration with OVEC. The companies have overlapping management, and

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<sup>17</sup> Ohio Adm. Code 4901-1-16(B) (emphasis added).

<sup>18</sup> AEP’s Motion at 4-11 (December 3, 2021).

<sup>19</sup> See Entry at ¶ 1 (January 15, 2020) (initiating an audit of the OVEC costs recovered through AEP’s Power Purchase Agreement Rider for the period of January 1, 2018 through December 31, 2019).

<sup>20</sup> ICPA, <https://www.sec.gov/Archives/edgar/data/73986/000000490406000041/x10a2.htm>.

OVEC is a customer of American Electric Power Service Corporation (“AEPSC,” a subsidiary of AEP).”<sup>21</sup>

It is therefore reasonable for parties to conclude that AEP’s affiliates and parent company possess information that is relevant to the costs passed on to customers through Rider PPA. As discussed above, AEP also incorrectly speculated that information from outside of an audit period has absolutely no relevance to the Commission’s review. Information from outside of an audit period can be relevant for many purposes, including the following: demonstrating that a pattern exists; demonstrating the economic effects of decisions made during the audit period or prior to the audit period that have an effect on costs assessed and collected from customers during the audit period; or demonstrating that certain information was available to an individual at a specific time. Therefore, AEP’s argument that the Deposition Noticed and Requests for Production of Documents seeks irrelevant information is overly simplified, not based in Ohio law, and ignores the substantial overlap of AEP, AEP’s affiliates, and AEP’s parent company’s involvement in the issues at hand in the above-captioned proceeding and related costs assessed to customers.

Consequently, the Commission should deny AEP’s Motion because, consistent with the Commission’s rules, the information sought by the Deposition Noticed and Request for Production of Documents appears reasonably calculated to lead to the discovery of admissible evidence.<sup>22</sup>

**B. Any Potential Burden that AEP May Face From the Deposition Noticed and the Requests for Production of Documents is Minimal When Viewed in Relation to the Proceeding.**

In determining the standard that movants must meet to satisfy Ohio Adm. 4901-1-24, the Commission concluded that, “the question is not the number of interrogatories, or the fact that the

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<sup>21</sup> Audit Report at 15.

<sup>22</sup> See Ohio Adm. Code 4906-2-14(B).

interrogating party is using successive methods of discovery,... but whether or not the demands are unduly burdensome or oppressive when viewed with relation to the case itself.”<sup>23</sup> The above-captioned proceeding concerns the PPA Rider through which AEP has recovered several millions of dollars from its customers to subsidize the company’s interest in the uneconomic coal plants (including one in Indiana). AEP’s customers have no choice but to pay the PPA Rider rates and participating in the Commission-ordered audit is one of the primary methods of recourse available to customers to ensure that the costs that they pay are prudent, prudently incurred, and in the best interests of customers. Therefore, the Commission should deny AEP’s Motion as any alleged burden it will face is de minimis compared to the context of the proceeding.

### III. CONCLUSION

For the aforementioned reasons, OMAEG and Kroger respectfully request that the Commission deny AEP’s Motion.

Respectfully Submitted,

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<sup>23</sup> *In the Matter of the Application of Columbus and Southern Ohio Electric Company for Authority to Amend & Increase Certain of Its Rates & Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserve.*, Case No. 81-1058-EL-AIR, 1982 WL 974263, Entry at ¶ 6 (June 7, 1982).

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## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 20, 2021 upon the parties listed below.

*/s/ Thomas V. Donadio*  
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12/20/2021 4:23:30 PM**

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

Summary: Memorandum Joint Memorandum Contra Ohio Power Company's  
Motion for Protective Order electronically filed by Mrs. Kimberly W. Bojko on behalf  
of OMA Energy Group and The Kroger Co.