

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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**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.)

**MEMORANDUM CONTRA TO
MOTION OF AEP OHIO FOR PROTECTIVE ORDER
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The PUCO ordered a prudence audit of AEP Ohio's charges to a million consumers for two uneconomic and polluting OVEC coal plants, for the period January 1, 2018 through December 31, 2019. The PUCO has authorized corporate welfare for AEP Ohio by way of allowing charges to consumers to subsidize the coal plants if the cost of producing the power exceeds the market revenues.

AEP Ohio derives revenues from bidding the plants' power output into the PJM markets.¹ To minimize charges to consumers, therefore, it is essential that the two power plants be operated prudently and efficiently. And consumer protection should mean AEP Ohio is acting prudently and reasonably in bidding its energy and capacity into the competitive PJM markets.

¹ *In the Matter of the Application of Ohio Power Company for Authority to Establish A Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 16-1852-EL-SSO Opinion and Order (Apr. 25, 2018).

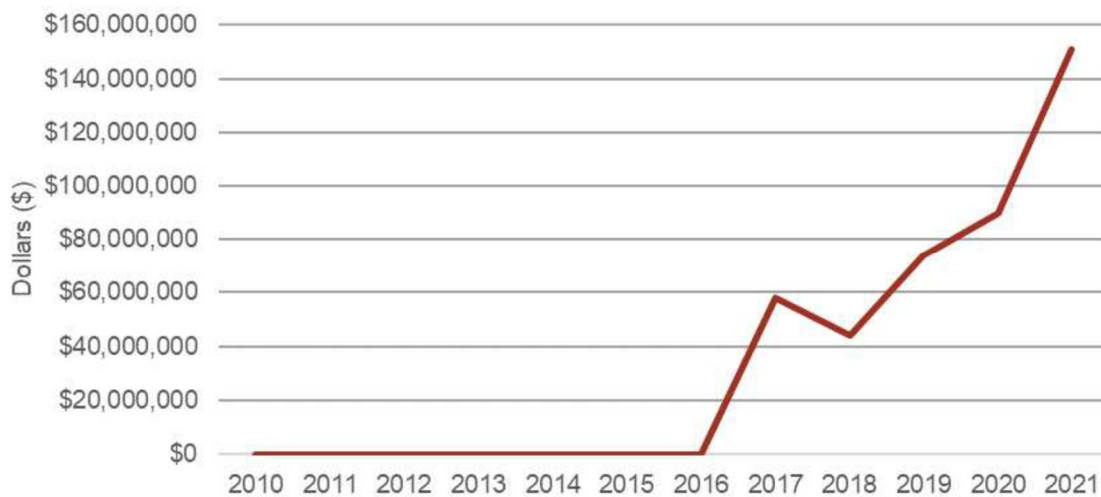
When the PUCO approved this charge, the PUCO expected that the charge would produce a net benefit for customers over the lifetime of the charge. Commissioner Trombold wrote:

Based on the forecasts submitted by the Company and evidence in the record, *it is my clear expectation, just as it is Commissioner Haque's, that the PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years.*²

Commissioner Trombold made this observation in 2016. Chair Haque said “[t]his should not be perceived as a blank check, and consumers should not be treated like a trust account.”³ Now, five years later, this expected net consumer benefit (credit) has not happened. No surprise there.

The amount of the subsidy has been much greater than forecasted in 2016 as shown below:

Figure 1: Annual OVEC Subsidy Collection⁴



² *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR. Opinion and Order, Concurring Opinion of Commissioner M. Beth Trombold at 2 (Mar. 31, 2016) (Emphasis added).

³ *Id.*, Concurring Opinion of Commissioner Haque at p. 5.

⁴ This chart appears in Runnerstone, LLC, *While HB 6's Remaining Provisions are Debated, Subsidies to Ohio Utilities Double to \$150M Annually for Two Aged Coal Plants* (Sept. 30, 2021).

The PUCO-appointed auditor, London Economics International LLC (“LEI”), then discovered a problem. The PUCO’s premise about consumer protection was flawed because, among other things, the PUCO used incorrect information. The auditor stated that an earlier calculation of the net benefit assumed that the levelized cost of entry for new generation in PJM was \$96.53/MWh.⁵ The auditor noted, however, that the true levelized cost of entry was actually lower than OVEC’s operating costs.⁶ That led the auditor to conclude that the OVEC plants “are not viable” in a competitive context (*i.e.*, will not result in a net credit for consumers).⁷

The PUCO now has an opportunity to correct this situation and protect AEP Ohio’s consumers. But AEP Ohio is not cooperating with the PUCO’s process. When OCC sought to depose an AEP Ohio witness, AEP Ohio filed a motion to quash.⁸ When OCC sought to depose an OVEC witness, AEP Ohio filed a motion to quash.⁹ The Attorney Examiner ordered AEP Ohio to produce a witness for deposition.¹⁰ Now AEP Ohio has filed a new motion for protective order stating that it will produce a witness for deposition, but it won’t produce the information requested by OCC.¹¹ The PUCO should not allow AEP Ohio’s obstructionist tactics to deny OCC its discovery.

⁵ Audit Report at 31 (Sept. 16, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ AEP Ohio Motion for a Protective Order (Sept. 16, 2020).

⁹ AEP Ohio Motion to Quash OVEC Subpoena (Dec. 1, 2021).

¹⁰ Entry at ¶ 27 (Oct. 5, 2021).

¹¹ AEP Ohio Motion for a Protective Order (Dec. 3, 2021).

OCC respectfully requests that the PUCO reject AEP Ohio's latest motion for protective order so that OCC can obtain information to protect consumers from the imprudent OVEC subsidy charges.

A. The scope of this proceeding is whether it is just and reasonable for AEP Ohio to charge consumers for its share of the OVEC coal plant subsidy charges. The discovery OCC seeks is well within this scope.

The PUCO opened these cases to audit AEP Ohio's OVEC charges for 2018 and 2019. The PUCO may, as part of this investigation, consider evidence relating to its original approval of the OVEC charges in the PPA Rider, regardless of when the evidence occurred or was produced. The PUCO may also consider actions taken by AEP Ohio's parent company and affiliates that relate to the reasonableness of AEP Ohio's OVEC charges.

1. The PUCO may properly consider evidence relating to its original approval of AEP's collection of OVEC coal plant charges in deciding whether the OVEC charges are just and reasonable to make Ohioans pay.

AEP Ohio argues that OCC should not be allowed to seek discovery on any matters relating to the PUCO's original approval of the OVEC charges. AEP Ohio's position is contrary to established PUCO precedent and the PUCO's order opening these cases. The PUCO should therefore reject AEP Ohio's motion for protective order.

AEP Ohio claims that it is entitled to a protective order on the following items because they relate to the PUCO's original approval of the OVEC charges and cannot be relitigated:

- "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.)¹²

The PUCO approved the OVEC charges in a 2016 ruling.¹³ Subsequent events have shown that the OVEC charges are unjust and unreasonable. AEP Ohio is now trying to prevent the PUCO from considering this evidence because AEP Ohio doesn't want the PUCO to hear the whole story of how unreasonable the OVEC charges really are. The PUCO should hear this evidence because it relates to an issue raised in the auditor's report and in the PUCO's RFP laying out the scope of this case.

When approving the OVEC subsidy charge, the PUCO relied on AEP Ohio's analysis in concluding the OVEC charges would be a net credit for consumers. Commissioner Trombold summarized this point as follows:

The PPA mechanism proposed by the Company is designed to operate as a financial hedge against such price volatility, wherein consumers pay more when market prices are low but pay less when market prices are high. *Based on the forecasts submitted by the Company and evidence in the record, it is my clear expectation, just as it is Commissioner Haque's, that the PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years.*¹⁴

However, AEP's analysis deserves a closer review. LEI, the PUCO's auditor, discovered that earlier estimates of the OVEC charges were based on 2010 gas prices that since that time have greatly decreased. LEI's audit report states:

LEI's LCOE [Levelized Cost of Entry] analysis...contrasts with the analysis provided by AEP Ohio in Summary of Benchmark Study.... The Benchmark Study results are based on Energy Information Administration data from 2010, which puts the

¹² AEP Ohio Motion for Protective Order at 4-5.

¹³ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Opinion and Order (Mar. 31, 2016).

¹⁴ *Id.*, Concurring Opinion of Chairman Trombold at p.2 (Mar. 31, 2016) (Emphasis added).

levelized cost of energy from a CCGT at \$96.53/MWh. This cost is much higher than LEI's LCOE partly as the result of the assumed prices for natural gas used in the analysis. In the time since 2010, natural gas prices have declined, reducing the LCOE for new CCGTs.¹⁵

The Auditor found that: “[s]ince the cost of the OVEC plants, at over \$50/MWh is even higher than the levelized cost of building a new CCGT, it also implies that in a competitive context, the OVEC plants would not be viable on a going-forward basis.”¹⁶ However, AEP Ohio's original analysis showed that, over the life of the PPA Rider, the OVEC charges would be a net credit for consumers.

The PUCO should consider the auditor's new information that “the OVEC plants would not be viable on a going-forward basis”¹⁷ and how this is different from earlier projections of OVEC's costs. This is part of the auditor's report. The PUCO's request for proposal sought an auditor to determine whether “the Company's actions were in the best interest of retail ratepayers.”¹⁸ The discovery OCC seeks in the notice of deposition goes to this issue. This information is clearly within the scope of discovery in this case.

Considering what was deleted from the draft PUCO audit report, the PUCO will only hear this information if OCC presents it. AEP Ohio is asking the PUCO to prevent this evidence from being heard in the public domain.

¹⁵ Audit Report at 24 (Sept. 16, 2020).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *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 & 18-1759, Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 4 (Jan. 15, 2020).

In *In re Dominion Purchased Gas Adjustment Clause*, the PUCO ruled that OCC could obtain discovery of certain transactions going back ten years even though the case only involved a prudency review of Dominion's gas costs for the two-year period ending October 31, 2005.¹⁹ The Attorney Examiner reasoned that the sought-after discovery was relevant to whether the costs during the audit period (and during the prior audit periods) was just and reasonable.²⁰ The ruling also discusses several other cases where the PUCO allowed discovery of matters outside the audit period.²¹

The PUCO's order approving the PPA Rider noted: "Our approval of AEP Ohio's request was based on evidence in the record reflecting that the OVEC PPA alone is projected to provide ratepayers with a net credit of approximately \$110 million..."²² The PUCO is entitled to weigh those earlier cost projections against the actual costs. The PUCO could conclude that current evidence shows that it is unlikely the PPA Rider will ever result in a credit and could disallow the OVEC costs on that basis. As the Ohio Supreme Court established this point in a prior AEP Ohio case:

The commission is entitled to modify a prior order, provided that it explains the change and the new regulatory course is permissible.

We have instructed the commission to 'respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.' This does not

¹⁹ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the East Ohio Gas Company d/b/a Dominion East Ohio and Related Matter*, Case No. 05-219-GA-GCR, Entry, 2006 Ohio PUC LEXIS 841 (July 28, 2006).

²⁰ *Id.* at ¶ 14.

²¹ *Id.* at ¶¶ 12-13.

²² *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Fifth Entry on Rehearing at ¶ 40 (Apr. 5, 2017).

mean, however, that the commission may never revisit a particular decision, only that if the commission does change course, it must explain why. ‘When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified.’ The court has not set the explanatory hurdle very high. In a case in which the commission did not follow its earlier precedent, we said that if the commission had put ‘[a] few simple sentences’ in its order to explain why the earlier case was no longer controlling, it would have been sufficient.²³

The discovery OCC seeks goes to the point that the OVEC rider will never act as a bill credit; therefore, the PPA Rider mechanism is illusory and is unjust and unreasonable. Then-PUCO Chair Haque addressed this point when the PUCO originally approved the OVEC charges:

After a period of charges, I expect to see credits from the PPA riders. I'm not going to give definitive timelines, but that is my expectation. If this mechanism is truly a hedge, wherein consumers will pay when market prices are low, but will be credited money back when market prices are high, then what exactly is the point of the hedge if ratepayers never experience the credits? If ratepayers never experience the credits, then *the PPA rider mechanism would then act as a somewhat illusory insurance policy.*²⁴

The discovery OCC seeks goes to whether the OVEC charges will ever result in a credit for consumers. The PUCO is entitled to consider this evidence because, as Commissioner Haque noted, if the OVEC charges do not result in a net credit then it is an illusory insurance policy and would therefore be unjust and unreasonable.

When the PUCO originally approved AEP Ohio's PPA Rider in an ESP case, OCC argued that the costs of the PPA Rider would render the ESP too costly such that it was not

²³ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶ 16 (Citations omitted).

²⁴ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Commissioner Haque at 4 (Mar. 31, 2016).

“more favorable in the aggregate” than a market-rate offer.²⁵ The premise for the PUCO’s approval of the PPA Rider was that the rider’s costs were subject to approval in the next ESP case and the PUCO would determine at that time whether the ESP costs were more favorable in the aggregate than the market-rate option. As the PUCO’s Merit Brief notes in OCC’s appeal of the ESP to the Supreme Court of Ohio:

Finally, with respect to costs associated with future filings required by the stipulation, the Commission properly found that OCC’s concerns were premature. The future filings are only commitments for future approval, not modifications to the existing ESP. The Commission will consider any such costs, if they are approved for recovery, in AEP Ohio’s next ESP proceeding, when the ESP/MRO test is applied.²⁶

The Supreme Court confirmed this point when it affirmed the PUCO’s ruling approving the ESP: “the renewable-energy projects at issue were to be developed in the future, and the commission would determine any cost recovery [under the PPA Rider] in Ohio Power’s next ESP case.”²⁷

OCC was unable to present evidence of OVEC costs when the ESP was originally approved (because the PUCO ruled it was premature – the actual costs were not known). And now that the actual costs are known, AEP Ohio argues that OCC can’t present evidence of the actual costs vs. projected costs (because it’s too late – the PUCO already approved the ESP). Under AEP Ohio’s approach, the PUCO would never be allowed to consider whether the actual OVEC costs are unreasonably higher than the original projections. This would prevent the

²⁵ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, OCC Application for Rehearing at 44-47 (May 2, 2016).

²⁶ *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, Appellee’s Merit Brief of Public Utilities Commission of Ohio at 34 (Oct. 23, 2017).

²⁷ *Id.*, Opinion at ¶ 37.

PUCO from considering whether the PPA Rider really would provide any net credits for consumers to act as a “hedge.”

The discovery OCC seeks goes to earlier projections of OVEC costs and it is relevant to the issue of whether the PPA Rider will really produce a net credit of approximately \$110 million. If the evidence shows this net credit will never occur, the PUCO could conclude that the OVEC costs are unjust and unreasonable. Prior PUCO cases establish that the PUCO can consider evidence from outside the audit period if it relates to whether the charges covered by the audit are just and reasonable. The information OCC seeks go to this point and are a proper topic for discovery. The PUCO should therefore overrule AEP Ohio’s motion for protective order.

2. The PUCO may properly consider actions by AEP Ohio’s parent company and affiliates in deciding whether the OVEC charges are just and reasonable.

AEP Ohio claims that it is entitled to a protective order for the following items because they relate to actions by AEP Ohio’s parent company or affiliates:

- “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.)
- “[T]he 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.)
- “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 objects to OCC’s discovery about the AEP Sustainability Report on the ground that the parent company is not the subject of this hearing and the Sustainability Report has nothing to do with this prudency review. Neither objection is valid.

OCC's discovery requests also seek information on AEP Ohio's affiliates' policies and practices for committing generation into a regional transmission organization's Day-Ahead Energy Market. The auditor criticized AEP Ohio for this practice.²⁸ If AEP Ohio's affiliates follow different policies and practices, then this would be relevant to whether AEP Ohio and OVEC acted prudently.

A prudent decision is defined as:

One which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision-making process of the utility's management.²⁹

One way to establish prudence is to compare a utility's actions to industry standards (i.e., other utilities' practices). This is a common practice, as shown by AEP Ohio's own statement referenced above about how AEP Ohio develops its environmental compliance strategy by studying the best practices of its affiliated utility operating companies. In the present case, the auditor took the same approach and judged the prudence of AEP Ohio's and OVEC's practices for committing the plants into the Day-Ahead Energy Market by comparing this to how other utilities do it.³⁰ This demonstrates that information from AEP Ohio's affiliates is relevant – because it provides evidence of the industry standard against which the PUCO can compare AEP Ohio's and OVEC's actions to determine whether they were prudent.

²⁸ Audit Report at 39-54 (Sept. 16, 2020).

²⁹ *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St. 3d 523, 530, 620 N.E.2d 826, 830 (1993).

³⁰ Audit Report at 21-22 (Sept. 16, 2020).

AEP Ohio argues that some of the information OCC seeks may not be in its possession, custody or control.³¹ This argument is without merit. AEP Ohio can obtain information from its parent company when it serves AEP Ohio's benefit. For example, the PUCO's standard filing requirements require AEP Ohio to present financial data, such as common equity information for both AEP Ohio and its parent company.³² The standard filing requirements also require AEP Ohio to provide information on the nature of participation of the parent company and affiliates in AEP Ohio's management processes. When AEP Ohio prepares its FERC Form 1, it obtains needed information from the parent company about the parent's management, finances and operations. AEP Ohio also obtains data from its affiliate companies when it serves AEP Ohio's purposes. AEP's website explains that the company develops its environmental compliance strategy by sharing "best practices across our entire system to improve performance across AEP."³³ This demonstrates that AEP Ohio can obtain information from its parent company and affiliates simply by asking for it.

AEP is organized into separate corporate entities, but it runs its operation as a single, common enterprise for the greater good of the parent holding company. The same persons serve as executive officers for the parent company and subsidiaries, as shown below:

³¹ AEP Motion for Protective Order at 5-6 (Dec. 3, 2021).

³² O.A.C. Chapter 4901-7. Standard Filing Requirements for Rate Increases, Page 105 of 165.

³³ AEP web page, Environmental Compliance - <http://www.aepsustainability.com/environment/performance/>.

AEP, Inc. Executive Officers³⁴	AEP Ohio Executive Officers³⁵
Nicolas K. Akins Chairman of the Board, President & CEO	Nicolas K. Akins Chairman of the Board & CEO
David M. Feinberg Executive VP, General Counsel & Secretary	David M. Feinberg Executive VP, General Counsel & Secretary
Lisa M. Barton Executive VP & CEO	Lisa M. Barton Executive VP - Transmission
Laura L. Hillebrand Executive VP & Chief Admin. Officer	Laura L. Hillebrand Executive VP & Chief Admin. Officer

AEP's annual report describes the nature of the single corporate enterprise as follows:

The member companies of the AEP System have contractual, financial and other business relationships with the other member companies, such as participation in the AEP System savings and retirement plans and tax returns, sales of electricity and transportation and handling of fuel. The companies of the AEP System also obtain certain accounting, administrative, information systems, engineering, financial, legal, maintenance and other services at cost from a common provider, AEPSC [AEP Service Company].³⁶

The PUCO's jurisdiction extends not only to AEP Ohio but also to the "records and accounts of any companies which are part of an electric utility holding company system."³⁷ The PUCO has jurisdiction over the records of AEP Ohio and all its affiliates that "in any way affect or relate to the costs associated with the provision of electric utility service."³⁸ This statute means that even if the records are in the custody and control of AEP Ohio's parent company or affiliates, the PUCO can reach those holding company system records. Other provisions of the

³⁴ American Electric Power Co Inc. Form 10-K at 32 (Feb. 25, 2021).

³⁵ AEP FERC Form 1 (2020).

³⁶ American Electric Power Co Inc. Form 10-K at 1 (Feb. 25, 2021).

³⁷ R.C. 4905.05.

³⁸ *Id.*

Revised Code, Chapter 49, also permit the PUCO to examine books, accounts, or other records kept by an electric utility or their affiliate as it relates to the utility business requiring corporate separation.³⁹

In addition to the PUCO's statutory jurisdiction over these records, the guidance under the Ohio Rules of Civil Procedure indicates that AEP Ohio's objection relating to the possession, custody or control of the records is without merit. Civil Rule 34 permits litigants to discover certain items "in the responding party's possession, custody, or control." A litigant "may obtain discovery from a subsidiary of a party from whom discovery is sought if the party from whom discovery is sought has control of the subsidiary."⁴⁰

In *Sedgwick v. Kawasaki Cycleworks, Inc.*,⁴¹ the court noted that a subsidiary can be required to provide this type of discovery if nominally separate corporate entities "are in fact a single unit."⁴² To determine whether related corporations are a single unit, a court must find : "(1) control of one by another; (2) that one was the mere conduit of the business of the other; and (3) the recognition of their separate existence would sanction a fraud, permit oppression and injustice."⁴³ OCC's discovery request meets this "single unit" standard due to the control the parent company exercises over the affiliates and the fact that the utility operating companies carry out the business strategies and operating practices developed at the parent company level. It would be an injustice for AEP Ohio to summon information from affiliates at will when it suits

³⁹ R.C. 4928.18.

⁴⁰ 36 Ohio Jur.3d Discovery and Depositions § 10, citing *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 660 N.E.2d 765 (C.P. 1993).

⁴¹ 24 Ohio App.3d 109, 111, 493 N.E.2d 308, 311 (10th Dist.1985).

⁴² *Id.*

⁴³ *Id.*

their own purposes, but to refuse to produce such information when requested by a third party or the PUCO.

Courts assess the underlying business relationship between parent and subsidiary (or affiliates) to determine whether a subsidiary may be required to provide its parent's documents in discovery. In *Dri-Steem Corp. v. NEP, Inc.*,⁴⁴ the court summarized the approach that courts have taken nationwide, noting that there are certain circumstances under which a subsidiary may be required to turn over information in the possession of the parent:

Where the relationship is such that the subsidiary can secure documents of the parent to meet its own business needs, courts have not permitted the subsidiary to deny control for purposes of discovery by an opposing party. *See e.g., First National City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir. 1959) (where there is access to the documents when the need arises in the ordinary course of business, there is sufficient control when the need arises because of governmental requirements); *Cooper Industries v. British Aerospace Corporation*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (where wholly-owned defendant subsidiary was the marketer and servicer of parent's aircraft in the United States, it was found "inconceivable" that subsidiary could not obtain aircraft manuals and related documents); *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984) (agent organization should be required to produce documents held by its principals). District courts in this circuit have found that a wholly-owned subsidiary has access and control over documents in the possession of its parent corporation when it markets the products of the parent company, when the two companies share databases dealing with a variety of documents and records, and when the subsidiary is able to obtain high-level documents from the parent company when it requests them. *See Choice-Intersil Microsystems, Inc. v. Agere Sys., Inc.*, 224 F.R.D. 471, 473 (N.D. Cal. 2004).⁴⁵

⁴⁴ 2014 WL 12776884 (D. Or. 2014).

⁴⁵ *Id.* at *2.

Following these standards, the PUCO should require AEP Ohio to produce information being held by its affiliates concerning policies and practices for bidding into a regional transmission organization's Day-Ahead Energy Market. As shown above, AEP Ohio can secure documents from the parent company, and its affiliates when the need arises in the ordinary course of business. Under the case law discussed above, the PUCO should therefore require AEP Ohio to produce information on its affiliates' bidding policies and practices.

B. The PUCO may properly consider AEP Ohio's actions after the audit period in deciding whether the OVEC charges are just and reasonable.

AEP Ohio also seeks a protective order to block the discovery of information that occurred or was prepared after the audit period. Once again, AEP Ohio relies on *In re Dominion Purchased Gas Adjustment Clause*. However, this ruling actually supports OCC's position. That is because, in that case, the PUCO ruled that OCC could obtain discovery of certain transactions going back ten years even though the case only involved a prudency review of Dominion's gas costs for the two-year period ending October 31, 2005.⁴⁶ The Attorney Examiner reasoned that the sought-after discovery was relevant to whether the costs during the audit period (and during the prior audit periods) was just and reasonable.⁴⁷

In the present case, OCC seeks discovery of information that occurred or was prepared after the audit period, but this information is relevant to whether OVEC's charges for 2018 and 2019 are just and reasonable. As discussed earlier, the PUCO approved the OVEC charges based on AEP Ohio's projection (which the auditor now reveals had a faulty assumption) that the OVEC charges would be a net credit over the lifetime of the "hedge" mechanism. If information

⁴⁶ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the East Ohio Gas Company d/b/a Dominion East Ohio and Related Matter*, Case No. 05-219-GA-GCR, Entry, 2006 Ohio PUC LEXIS 841 (July 28, 2006).

⁴⁷ *Id.* at ¶ 14.

that occurred or was produced after the audit period shows that the OVEC charges will never be a net credit, then the PUCO should not approve collection of any above-market charges for 2018 or 2019 because this would be unjust and unreasonable.

II. CONCLUSION

OCC needs information from AEP Ohio for case preparation as part of protecting consumers from the OVEC subsidy charge. The information OCC seeks is relevant to the issue of whether the OVEC subsidy charge is just and reasonable.

At every turn, AEP Ohio has attempted to block OCC's efforts to obtain information. When OCC sought a deposition from AEP Ohio's designated representative, AEP Ohio filed a motion for protective order.⁴⁸ When OCC sought a subpoena to depose OVEC's designated representative, AEP Ohio filed a motion to quash.⁴⁹ The PUCO approved OCC's request to depose AEP Ohio's corporate representative⁵⁰ and AEP Ohio now seeks to produce the witness for deposition but to unreasonably limit the deposition topics and documents so that the witness would not produce any meaningful information. The PUCO should overrule AEP Ohio's motion for protective order and allow OCC to obtain the information it needs to investigate the OVEC subsidy charge for protection of a million residential AEP consumers.

⁴⁸ AEP Ohio Motion for a Protective Order (Sept. 16, 2020).

⁴⁹ AEP Ohio Motion to Quash OVEC Subpoena (Dec. 1, 2021).

⁵⁰ Entry at ¶ 27 (Oct. 5, 2021).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served upon the persons listed below by electronic transmission this 20th day of December 2021.

/s/ John Finnigan

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Summary: Memorandum Memorandum Contra to Motion of AEP Ohio for
Protective Order by Office of the Ohio Consumers' Counsel electronically filed by
Ms. Deb J. Bingham on behalf of Finnigan, John