BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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 IN SUPPORT OF MOTION OF OHIO POWER COMPANY FOR PROTECTIVE ORDER

I. INTRODUCTION

On November 19, 2021, the Office of the Ohio Consumers' Counsel ("OCC") noticed a deposition of a representative of Ohio Power Company ("AEP Ohio"). The notice listed almost two dozen topics and requested almost thirty categories of documents. On December 3, 2021, AEP Ohio filed a Motion for Protective Order. AEP Ohio did not ask that the deposition be cancelled, but only that it not be required to produce testimony or documents on specific topics that are irrelevant to the prudency review that is the purpose of these proceedings, including:

1. how and why AEP Ohio originally decided, years ago, to include its power purchase agreement ("PPA") with Ohio Valley Electric Corporation ("OVEC") in the PPA Rider;
2. how AEP Ohio's ultimate parent company (American Electric Power) plans to describe OVEC in a "Sustainability Report";
3. how AEP Ohio's affiliates commit plants *other* than OVEC into PJM or MISO's Day-Ahead Energy Markets; and
4. OVEC-related analyses that may have been developed, and communications and discussions that may have occurred, after the audit periods at issue (2018-2019).

On December 20, 2021, OCC and, jointly, Ohio Manufacturers' Association Energy Group ("OMAEG") and The Kroger Co. ("Kroger"), filed memorandum contra AEP Ohio's Motion. OCC and OMAEG-Kroger's memorandum contra do not demonstrate that the contested deposition testimony and documents they seek are relevant to these proceedings. Indeed, the largest contested category of testimony and documents – those relating to information created after the 2018-2019 audit periods – has already been found to be irrelevant and not subject to discovery. *See* Entry ¶ 18 (Dec. 21, 2021). For the reasons provided in AEP Ohio's Motion and supplemented below, the Commission should grant AEP Ohio's Motion for Protective Order. AEP Ohio is filing this Reply five days ahead of schedule in an attempt to give the Commission the opportunity to rule on the motion prior to the scheduled deposition on December 23, 2021 (since the witness will not be presented on these topics absent a ruling on this Motion).[1]

II. AEP Ohio is Entitled to a Protective Order Regarding The Irrelevant Topics and Document Request Categories Listed in OCC's Notice of Deposition.

A. AEP Ohio is contesting the relevance of OCC's discovery requests, not OCC's right to take a deposition or request documents.

OMAEG and Kroger begin their Joint Memorandum Contra by asserting OCC's "ample rights to discovery" under R.C. 4903.082 and, specifically, OCC's right to serve document requests and notice depositions under Ohio Adm.Code Chapter 4901-1. (OMAEG-Kroger Joint Memo Contra at 4-5.) AEP Ohio does not contest OCC's right to serve reasonable discovery requests. Indeed, AEP Ohio responded fully to four sets of written discovery from OCC before OCC ever noticed a deposition. (*See* Motion of Ohio Power Co. for Protective Order at 4 (Jan.

[1] Ohio R. Civ. P. 30(D) anticipates the suspension of depositions when there are fundamental disputes like those raised in the Motion for Protective Order in order to permit the Court to resolve them. "Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order."

11, 2021).) And OCC had clear rights to notice a deposition, now that the Commission scheduled a hearing in these proceedings. *See* Entry ¶ 27 (Oct. 5, 2021). AEP Ohio is not asking the Commission to protect it from discovery. It is asking that the Commission protect it from providing deposition testimony on specific topics and categories of documents that clearly fall outside the scope of these proceedings.

B. OCC has not demonstrated that the contested discovery requests are relevant to these audit proceedings.

With regard to the actual objections that AEP Ohio raised to specific topics and document requests within OCC's deposition notice, OCC, OMAEG, and Kroger have not demonstrated that the contested deposition testimony topics and document requests are relevant to these proceedings.

1. OCC has not demonstrated that any competitive bidding processes or least-cost-resource analyses used or performed by AEP before including OVEC in the PPA Rider are relevant to this proceeding.

In its Motion for Protective Order, AEP Ohio sought protection from producing testimony or documents in response to OCC discovery requests relating to any "competitive bidding process" or "least-cost resource" analysis that AEP Ohio used or performed before choosing to include the OVEC PPA in the PPA Rider. (AEP Ohio Motion for Protective Order at 4-5, citing Notice of Deposition, Matter ## 5-6 and Document Request ## 5-6.) AEP Ohio commented that it appeared OCC intends to use these audit proceedings to relitigate the Commission's decision to include the OVEC PPA in the PPA Rider.

OCC's Memorandum Contra confirms AEP Ohio's suspicions. OCC admits it is seeking discovery regarding "earlier projections of OVEC costs" because it believes those projections will reveal "whether the PPA Rider will really produce a net credit of approximately $110 million." (OCC Memo Contra at 10.) OCC points to an analysis of Levelized Cost of Entry

(LCOE) in LEI's Audit Report which, OCC says, came to a different conclusion (using Energy Information Administration (EIA) data from 2020) than American Electric Power Service Corporation did in an analysis attached to the 2011 Amended and Restated OVEC Inter-Company Power Agreement (ICPA) (using EIA data from 2010). (OCC Memo Contra at 5-6.) OCC argues that the difference in LCOE results justifies re-opening the decision to approve the PPA Rider, because "[s]ubsequent events have shown that the OVEC charges are unjust and unreasonable." (*Id.* at 5.) OCC suggests, moreover, that the Commission's approval of the PPA Rider was conditioned on the PPA Rider providing a net credit over its first eight years (*see* OCC Memorandum Contra at 2 and 5, citing *In re 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 ("*PPA Rider Case*"), Opinion and Order, Concurring Opinion of Commissioner Trombold at 2 (Mar. 31, 2016)), and that any evidence demonstrating a different result will prove "the PPA Rider mechanism is illusory and is unjust and unreasonable" (OCC Memo Contra at 8). OCC's argument misstates the Commission's authority to reconsider the Rider's past approval six years after-the-fact based on evidence post-dating the audit period; severely misrepresents the Commission's rulings in approving the PPA Rider; and disregards important changes in the Rider's status.

To support the discoverability of AEP Ohio's original OVEC cost projections, OCC points to a 2006 Entry in a Dominion East Ohio case, in which OCC says the Commission allowed discovery in an audit proceeding "going back ten years," (OCC Memo Contra at 7, citing *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 and Related Matters*, Case No. 05-219-GA-GCR ("*In re Dominion East Ohio*"), Entry ¶ 14 (July 28, 2006).) But the

Dominion entry acknowledged that "[t]he Commission has historically only permitted a review of matters during the audit period involved in a case." *In re Dominion East Ohio*, Entry ¶ 11 (July 28, 2006), citing *In re Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Cleveland Electric Illuminating Company and Related Matters*, Case No. 83-38-EL-EFC, Opinion and Order (Feb. 2, 1984). The Entry said that the Commission had subsequently created an exception to that practice to allow reviews of "clerical errors" and "financial errors" in prior audit periods, and then extended that exception again to apply to "fraud [that] may have been committed in a prior audit proceeding." *Id.* ¶¶ 12-14. But none of these exceptions applies here. OCC is not asserting there were clerical errors, financial errors, or fraud in the prior audit proceeding for AEP Ohio's PPA Rider (Case No. 18-1003-EL-RDR); it is asserting that the projections that the Commission relied on to approve the PPA Rider in the first place have been proven faulty by more recent projections.

OCC's argument also rests on the presumption that "the PUCO can consider evidence [post-dating] the audit period if it relates to whether the charges covered by the audit are just and reasonable." (OCC Memo Contra at 10.) Specifically, OCC asserts that it is entitled to revisit the original cost projections from the *PPA Rider Case* because LEI's updated LCOE analysis in 2020 "shows that it is unlikely the PPA Rider will ever result in a credit * * * ." (*Id.* at 7.) But as the Commission held in its Entry of December 21, 2021, "reports, forecasts, policies, and other information that pertains to 2020 and 2021, which is beyond the period under review in these proceedings * * *[,] is not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence." Entry ¶ 18 (Dec. 21, 2021). Even OCC acknowledges that the prudency standard to be applied in these proceedings "contemplates a retrospective, factual inquiry, without the use of hindsight judgment * * * ." (OCC Memo

Contra at 11, quoting *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 530, 620 N.E.2d 826 (1993).) Because LEI's new LCOE analysis relies on EIA data from 2020, it cannot be used to disprove the prudence of AEP Ohio's PPA Rider charges in 2018 and 2019.

Nor did the Commission's prior orders approving the PPA Rider even suggest that the Rider's charges could be cancelled retroactively if the projections used to support the Rider proved faulty. To the contrary – the Commission Opinion and Order acknowledged that the projections it was relying on were "simply predictions of future market prices and costs" that "may be proven wrong in the future * * * ." *Id.*, Opinion and Order at 81. Commissioner Trumbold's concurring opinion repeated this theme:

> One of the challenges of utility regulation is that it is based on *forecasts*, and forecasts are just that: a prediction about an uncertain future. We all know there have been changes in the market in recent years caused by the weather, the economy, technological innovations, and environmental considerations that have resulted in market prices no one predicted despite our best attempts to forecast them.

PPA Rider Case, Opinion and Order, Concurring Opinion of Commissioner Trombold at 2 (Mar. 31, 2016). And Commissioner Haque's concurring opinion made much the same point:

> First, let's talk about the rate impacts of the PPA rider in the AEP and FirstEnergy service territories. There were projections for the riders presented in both cases, and all of the projections presented had their merits. Here's what I think I know from these projections. I think that, based upon the projections and the evidence in the record, there is general consensus that the PPA riders will result in a charge to consumers for at least the first 2-3 years of the riders.
> * * *
>
> Beyond those first few years, it is unclear whether the PPA riders will result in more charges to ratepayers, or if the riders will result in credits being applied to the bills of ratepayers. The utilities believe that the riders will create bill credits. The Ohio Consumers' Counsel and others believe that the riders will continue to create charges. The expert witnesses in the case have presented divergent data points that yielded very different projections. However, I've seen so many dynamic changes in the market since I've taken

> office that it's hard for me to be convinced that any expert can truly project with accuracy beyond a few years out.

PPA Rider Case, Opinion and Order, Concurring Opinion of Commissioner Haque at 4 (Mar. 31, 2016). Indeed, because the Commission recognized that the projections might prove wrong, it "modif[ied] the stipulation to include a mechanism to * * * limit customer rate increases related to the PPA rider [to] five percent of the June 1, 2015 SSO rate plan bill schedules [on an individual customer-by-customer basis] * * * through May 31, 2018." *Id.* at 81. *See also id.*, Concurring Opinion of Commissioner Haque at 4 (referencing the "consumer protections" that the Commission "buil[t] in * * * to ensure that bills do not increase beyond a certain limit"). For OCC to come back to the Commission six years later, and suggest that the 2016 Commission intended to zero out the PPA Rider charges retroactively if AEP Ohio's projections did not pan out, puts words in the mouths of the Commission – and ignores what it actually wrote. OCC's argument also ignores the fact that the PPA Rider is no longer in place. For all of the reasons, OCC Matter ## 5-6 and Document Request ## 5-6 are irrelevant, and discovery on those matters should not be permitted.

2. OCC has not demonstrated that the actions of AEP Ohio's parent company or affiliates are relevant to this proceeding.

Next, OCC asserts that AEP Ohio is required to provide testimony and produce documents relating to three topics: (1) how AEP Ohio's parent company plans to characterize "the OVEC plants or Inter-Company Power Agreement * * * in the AEP Sustainability Report"; (2) how AEP Ohio's affiliates commit plants into the PJM or MISO Day-Ahead Energy Market; and (3) any financial analysis of projected revenues versus variable operating costs plus shutdown and start-up costs that AEP Ohio's affiliates currently use to commit plants into the PJM or MISO Day-Ahead Energy Markets. (*See* AEP Ohio Motion for Protective Order at 5-6; OCC Memo Contra at 10.)

On the first topic, OCC makes no attempt to explain why the AEP Sustainability Report is relevant to these proceedings, other than to deny that AEP Ohio's "objection is valid." (OCC Memo Contra at 10.) And neither do OMAEG and Kroger, who simply assert that AEP must have "information that is relevant to the costs passed on to customers through Rider PPA" because AEP is mentioned in the Audit Report. (OMAEG-Kroger Joint Memo Contra at 5-6.)

On the second and third topics, OCC brushes aside AEP Ohio's statement that it does not believe it possesses the information and documents OCC has requested (*see* AEP Ohio Motion for Protective Order at 6), arguing that "AEP Ohio can obtain information from its * * * affiliates simply by asking for it." (OCC Memo Contra at 12.) But that is not the standard for obtaining documents under the Commission's rules. A party may only request documents that are in another party's "possession, custody, or control." Ohio Adm.Code 4901-1-20(A)(2). This does not include documents in the possession, custody, or control of the party's parent company or affiliates. *See In re Complaint of The Manchester Group, LLC v. Columbia Gas of Ohio, Inc.*, Case No. 08-360-GA-CSS, Entry ¶ 4 (Nov. 13, 2009). OCC cites to *Sedgwick v. Kawasaki Cycleworks, Inc.,* 24 Ohio App.3d 109, 111, 493 N.E.2d 308, 311 (10th Dist.1985) to support its argument that a subsidiary may be required to provide such discovery. (*See* OCC Memo Contr at 14.) However, the appellate court in that case found the *opposite*. Indeed, the court found that the trial court *erred* in sanctioning a corporation for failing to produce documents in the possession, custody, or control of its parent company and its subsidiary. OCC also cites R.C. 4905.05, which states that the Commission has jurisdiction over "the records and accounts of any companies which are part of an electric utility holding company * * * insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company

system." But the statute has nothing to do with OCC's discovery rights under Ohio Adm.Code Chapter 4901-1. And OCC fails to explain how documents relating to the strategies and analyses that guide AEP Ohio's non-Ohio affiliates in committing plants into the PJM or MISO Day-Ahead Energy Markets "affect or relate to the [AEP Ohio']s costs" to provide electric utility service in Ohio anyways. R.C. 4905.05. OCC further cites to Oh. Jur for the proposition that a litigant may obtain discovery from the subsidiary of a party from whom discovery is sought. (*See* OCC Memo Contr. at 14). But OCC served discovery upon AEP Ohio. AEP Corporation is not a subsidiary of AEP Ohio, quite the *opposite*.

Similarly, a party may depose another party's representatives only on "matters known or reasonably available to the organization." Ohio Adm.Code 4901-1-21(F). AEP Ohio could theoretically approach its affiliates and ask them to divulge their PJM or MISO market participation strategies and decisions, but that does not make such information "reasonably available" to AEP Ohio. AEP Ohio should not be required to prepare a witness to provide deposition testimony on *other* companies' participation in the PJM or MISO Day-Ahead Energy Market.

3. Information that occurred or was prepared after the audit period is not relevant to the prudence issues being examined.

Finally, OCC briefly argues that "information that occurred or was prepared after the audit period * * * is relevant to whether OVEC's charges for 2018 and 2019 are just and reasonable." (OCC Memo Contra at 16.) And Kroger-OMAEG repeat the argument that they raised in opposition to the electric distribution utilities' motion to quash OCC's subpoena to OVEC: that "[i]nformation from outside of an audit period can be relevant for many purposes * * * ." (OMAEG-Kroger Joint Memo Contra at 6.) But, as noted above, the Commission has rejected those arguments, holding that "reports, forecasts, policies, and other information that

pertains to 2020 and 2021 * * * is not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence." Entry ¶ 18 (Dec. 21, 2021). Accordingly, AEP Ohio should not be required to provide testimony or produce documents on the topics listed on pages 8 through 12 of its Motion for Protective Order, to the extent that such testimony or those documents would relate to analyses, discussions, decisions, or other matters occurring after the 2018-2019 audit periods.

C. The Commission is authorized to grant motions for protective order where a party seeks irrelevant information through discovery.

Lastly, OMAEG and Kroger suggest that the Commission lacks the ability to grant motions for protective order against discovery on irrelevant topics unless the discovery being sought is "unduly burdensome or oppressive when viewed with relation to the case itself." (OMAEG-Kroger Joint Memo Contra at 7, citing *In re Application of Columbus and Southern Ohio Electric Company for Authority to Amend & Increase Certain of Its Rates & Charges for Electric Service*, Case No. 81-1058-EL-AIR, Entry ¶ 6 (June 7, 1982).) But the holding in *In re Application of Columbus and Southern Ohio Electric Company* does not apply here. In that case, the movant did not seek protection because OCC sought discovery on irrelevant topics; it argued that OCC's "request for depositions * * * close to the start of * * * hearing," after serving numerous "prior discovery requests," was "an abuse of the discovery process." *In re Application of Columbus and Southern Ohio Electric Company*, Entry ¶¶ 3-4. Indeed, the Commission's Entry in that case noted that the Commission had not been "asked to examine the reasonableness of the interrogatories * * * ." *Id.* ¶ 4.

Here, AEP Ohio *is* asking the Commission to examine the reasonableness – specifically, the relevance – of OCC's discovery requests. Rule 4901-1-16 limits the scope of discovery in Commission proceedings to matters that are "relevant to the subject matter of the proceeding."

The Commission has granted motions for protective order in other cases where OCC has sought irrelevant discovery. *See*, *e.g.*, *In re Complaint of the Office of Consumers' Counsel v. Eastern Natural Gas Co.*, Case No. 89-800-GA-CSS, Entry, 1989 Ohio PUC LEXIS 1047, ¶¶ 7-10 (Oct. 19, 1989); *In re Application of The Ohio Bell Telephone Co. to Revise its Exchange and Network Services Tariff*, Case Nos. 90-467-TP-ATA *et al.*, Entry, 1991 Ohio PUC LEXIS 1035, ¶ 7 (Aug. 23, 1991). It should do so again here.

III. Conclusion

For the reasons provided above, AEP Ohio respectfully requests that the Commission grant its motion for protective order and 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
Steven T. Nourse (0046705), Counsel of Record
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

Michael J. Schuler (0082390)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 296-0531
Fax: (614) 716-2950
Email: mjschuler@aep.com

Matthew S. McKenzie (0091875)
M.S. McKenzie Ltd.
P.O. Box 12075
Columbus, Ohio 43212
Telephone: (614) 592-6425
Email: matthew@msmckenzieltd.com

Eric B. Gallon (0071465)
Porter, Wright, Morris & Arthur LLP
41 South High Street, 30th Floor
Columbus, Ohio 43215
Telephone: (614) 227-2190
Email: egallon@porterwright.com

(willing to accept service by email)

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 *Reply in Support of 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 22nd day of December, 2021, via electronic transmission.

/s/ *Steven T. Nourse*
Steven T. Nourse

EMAIL SERVICE LIST

amy.botschner.obrien@occ.ohio.gov
angela.obrien@occ.ohio.gov
bmckenney@mcneeslaw.com
bojko@carpenterlipps.com
christopher.healey@occ.ohio.gov
donadio@carpenterlipps.com
Jeanne.Kingery@duke-energy.com
jkylercohn@BKLlawfirm.com
john.finnigan@occ.ohio.gov
kboehm@BKLlawfirm.com

Attorney Examiners:
Greta.See@puc.state.oh.us
sarah.parrot@puc.state.oh.us

Kyle.Kern@OhioAGO.gov
Jeanne.Kingery@duke-energy.com
megan.wachpress@sierraclub.org
mkurtz@BKLlawfirm.com
mpritchard@mcneeslaw.com
paul@carpenterlipps.com
randall.griffin@aes.com
rdove@keglerbrown.com
Rocco.Ascenzo@duke-energy.com
ssiewe@beneschlaw.com
Steven.beeler@OhioAGO.gov
talexander@beneschlaw.com
Thomas.Lindgren@OhioAGO.gov
tlong@mcneeslaw.com
william.michael@occ.ohio.gov

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