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

OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW

I. INTRODUCTION

On December 23, 2021, Attorney Examiner Parrot issued an entry ("the December 23rd Entry") holding that the Office of the Ohio Consumers' Counsel ("OCC") is not entitled "to obtain reports, forecasts, policies, and other information that pertains to 2020 and 2021" in discovery because those years are "beyond the period under review in these proceedings * * * ." December 23rd Entry at ¶ 15. In so holding, the Entry echoed a holding from an entry issued two days prior, which granted in part a motion to quash a subpoena that OCC had served on the Ohio Valley Electric Corporation ("OVEC"). *See* Entry ¶ 18 (Dec. 21, 2021). The December 23rd Entry further held that OCC may not seek discovery "regarding the basis for AEP Ohio's decision to include the OVEC PPA in the PPA Rider" because the inclusion of the OVEC PPA in the PPA Rider "is also beyond the scope of these proceedings * * * ." December 23rd Entry at ¶ 15. As the Entry notes, the Commission authorized the inclusion of the OVEC PPA in the *PPA Rider Case* and the *ESP 4 Case, id.*, and that decision is not up for reconsideration here.

OCC's Interlocutory Appeal does not challenge any portion of the December 21st Entry. Nor does it challenge the Attorney Examiner's ruling that the decision to include the OVEC PPA in the PPA Rider is not at issue in these proceedings. It challenges only the Attorney Examiner's December 23rd ruling that "information regarding 2020 and 2021" is "'outside the scope' of the audit period in this case." (Mem. Supp. OCC Interlocutory Appeal at 1.) Yet OCC offers no valid reason to certify an interlocutory appeal to the Commission, or for the Commission to reverse the Attorney Examiner's ruling if an interlocutory appeal were certified.

OCC claims that the Commission "routinely allows parties to obtain information outside of the audit period where appropriate." (*Id.* at 2.) Yet OCC's sole support for its purported entitlement to information developed *after* the audit period is an opinion that allowed discovery regarding the time *before* the audit period in that case. (*See id.* at 2-3.) OCC simply ignores the other precedent explicitly prohibiting discovery relating to matters outside the audit period. (*See* Mem. Supp. Motion of Ohio Power Co., *et al.*, to Quash Subpoena at 5 (Dec. 1, 2021).) Next, OCC fails to explain why the Commission must review the December 23rd Entry immediately, rather than in its eventual opinion and order in these proceedings. Finally, OCC offers only one reason it feels it needs to discover information from 2020 and 2021, and the Attorney Examiner has already rejected it. OCC insists that "current evidence shows that it is unlikely the PPA Rider will ever result in a credit" and argues that this is a basis for disallowing any cost recovery. (Mem. Supp. OCC Interlocutory Appeal. at 3.)[1] But, as indicated above, OCC has not challenged the Attorney Examiner's ruling that the PPA Rider is not up for reconsideration. Accordingly, OCC cannot demonstrate that the December 23rd Entry caused it prejudice.

[1] It should be noted that OCC's argument is nonsensical; the PPA Rider was discontinued two years ago (*see* R.C. 4928.148(A)), so it will never result in a credit *or* a charge going forward.

For all of these reasons, as further explained below, the Attorney Examiner should decline to certify an interlocutory appeal. And if an interlocutory appeal is certified, the Commission should affirm the December 23rd Entry.

Finally in this regard, to the extent OCC seeks to reopen the deposition of AEP Ohio witness Stegall that was conducted on December 23, the Company strongly objects even if the December 23rd Entry is modified by the Commission. OCC did not reserve any right to reopen the deposition at any point during the deposition. And OCC has had ample discovery rights in this case, including access to all of the Auditor's requests and Company responses and submitting OCC's own voluminous discovery requests, but it is completely unjustified and unfair to reopen the deposition that was already completed – especially for a witness that will appear for cross examination at the scheduled evidentiary hearing.

II. The Commission Should Decline to Certify the Interlocutory Appeal.

Under the Commission's rules, "[t]he * * * attorney examiner * * * shall not certify [an interlocutory] appeal unless he or she finds that [1] the appeal [a] presents a new or novel question of interpretation, law, or policy, or [b] is taken from a ruling which represents a departure from past precedent *and* [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties * * * ." (Emphasis added.) Ohio Adm.Code 4901-1-15(B). The party seeking certification of an interlocutory appeal must satisfy both prongs of this test. "The failure to demonstrate [one] element, even where the [other] is satisfied, is fatal to any application for certification of an interlocutory appeal * * * ." *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry ¶ 24 (May 25, 2018).

Here, OCC asserts that the December 23rd Entry represents "a departure from past precedent" and must be reversed to avoid "undue prejudice or expense to OCC and AEP's

consumers" (Interlocutory Appeal at 2) – specifically, customers "having to continue paying unjust and unreasonable charges" (Mem. Supp. Interlocutory Appeal at 8). But the December 23rd Entry is entirely consistent with this Commission's precedent. And OCC has not explained how the December 23rd Entry is immediately prejudicial, much less unduly so. The Commission can review the Attorney Examiner's rulings in its opinion and order. And when it does, it will assuredly agree that the discovery OCC seeks is desired only to support an argument (that "the PPA Rider mechanism * * * is unjust and unreasonable") (*id.* at 4) that the Attorney Examiner has already ruled out-of-bounds. *See* December 23rd Entry at ¶ 15.

A. The December 23rd Entry does not represent a departure from past precedent.

With regard to the first prong of the test for certifying an interlocutory appeal, OCC asserts that the December 23rd Entry departs from past precedent because "the PUCO routinely allows parties to obtain information outside of the audit period where appropriate." (Mem. Supp. Interlocutory Appeal at 2.) However, the Commission opinion that OCC cites for that proposition (*see id.* at 2 nn. 8-9) states that "[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 ("*In re Dominion GCR*"), Entry, ¶ 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, *10, 95-96 (May 25, 1994) (declining to review the appropriateness of the retirement of a dragline in 1994 because it was "a matter outside the review period of the audits conducted in [that] case," December 1, 1992, to November 30, 1993). For that reason, the Commission does not generally permit discovery

relating to matters outside the audit period. *See* Entry ¶ 18 (Dec. 21, 2021). *See also 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) (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").

As a preliminary matter, OCC complains (at 5) that it will "never" be allowed to demonstrate whether projected costs would exceed revenues under the PPA Rider because it was prevented from prematurely addressing the issue when the ESP was originally approved and is now being prevented from attempting a similar showing with actual costs. There is no way to disguise the fact that OCC's efforts in this regard serve one purpose and one purpose alone: to try and undermine and challenge the Commission's previous final ruling (already affirmed by the Supreme Court) that the PPA Rider should include the ICPA costs. That is not a valid purpose and the Commission need not entertain or facilitate it through discovery rulings. OCC's quotation (at 5) is misplaced from *In re Application of Ohio Power Co.*, Ohio Sup. Ct. Case No. 2017-752, Merit Brief of Appellee Public Utilities Commission of Ohio at 34 (Oct. 23, 2017), and *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698, at ¶ 37. Paragraph 37 in the Court's Opinion was referring to costs related to the 900 MW renewable power commitment being considered as part of the MRO test; it has nothing to do with ICPA costs flowing through the PPA Rider during 2018-2019. Even leaving aside the fact that OCC is prevented from challenging the Commission's previous decision to approve the recovery of net ICPA costs through the PPA Rider during the 2018-2019 period, any prospective consideration of whether the Commission got it wrong is completely moot, since the Ohio General Assembly replaced the PPA Rider effective January 1, 2020 with the Legacy Generation Rider through

enactment of R.C. 4928.148. So in addition to being unlawful, OCC's effort to second-guess the prior Commission rulings is a complete waste of time. The only issues in this audit proceeding are whether costs incurred during the 2018-2019 audit period were prudently incurred and properly accounted for by the Company – which the Entry permits OCC to fully explore.

Reaching even further in a desperate attempt to meet the first prong for certification of its interlocutory appeal, OCC cites to precedent from another state – the Michigan Public Service Commission (Mem. Supp. Interlocutory Appeal at 6-7.) But rulings by the Michigan Public Service Commission are not "precedent" for the Commission and certainly not what is contemplated under Ohio Adm.Code 4901-1-15(B) of the Commission's rules. Moreover, the Michigan law being applied in that case conflicts with Ohio law in several key respects (*e.g.*, there is no inverse pricing rule in Ohio, there is no statutory OVEC cost recovery mechanism in Michigan, the Michigan ruling considers issues outside of the audit period, etc.) and cannot even be relied upon by OCC as persuasive authority for any determination in this case.

OCC does correctly assert (at pp. 2-3) that a 2006 Entry allowed OCC to conduct discovery of transactions from the ten years preceding the audit period in a 1985 Gas Cost Recovery proceeding for Dominion East Ohio. *See In re Dominion GCR*, Entry (July 28, 2006). But the *Dominion* Entry is inapplicable here. In that Entry, the Commission recognized that "[t]he Commission's practice of generally only reviewing matters during the audit period" had been modified to allow consideration of clerical and financial errors made during prior audit periods. *In re Dominion GCR*, Entry ¶¶ 12-13. The Entry then expanded that modification to the Commission's practice to allow a review of "transactions, occurring prior to the audit period, * * * which involve allegations of fraud * * * ." *Id.* ¶ 14. But none of those exceptions to the Commission's general practice applies here. OCC is not asking for a review of clerical or

financial errors or fraudulent transactions in prior audit periods; it is asking for a review of new information that arose *after* the audit periods. (Mem. Supp. OCC Interlocutory Appeal at 2.) There is no contradiction between the December 23rd Entry and the *Dominion* Entry.

The December 23rd Entry also does not "depart[ ] from * * * Ohio Supreme Court precedent" (*id.*), as OCC argues. OCC asserts that "the Ohio Supreme Court recently reversed the PUCO in denying OCC its discovery rights under law and rule" in a case involving "the certification of FirstEnergy Advisors." (*Id.* at 4, citing *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630.) But the *FirstEnergy Advisors* opinion did not even hold that OCC was entitled to the discovery it sought in that case, much less all of the discovery it ever requests. The opinion simply remanded the Commission's dismissal of certain motions to compel on mootness grounds and instructed the Commission to decide those motions "on the merits." *In re FirstEnergy Advisors*, Slip Opinion No. 2021-Ohio-3630, ¶¶ 17, 41-42.

In doing so, the Supreme Court of Ohio noted that OCC's right to discovery is based in R.C. 4903.082 and Ohio Adm.Code 4901-1-16. *Id.* at ¶ 42. The statute, importantly, limits parties in Commission proceedings to "reasonable discovery." R.C. 4903.082. The Commission's rules, in turn, permit discovery only on matters that are "relevant to the subject matter of the proceeding." Ohio Adm.Code 4901-1-16(B). Further, beyond wanting to retrospectively try and show that inclusion of the ICPA in the PPA Rider was a bad decision (clearly out of bounds), OCC makes no attempt to show that it pursued any post-2019 matters that are related to the Audit Report issues or any other matter germane to this proceeding.

Because OCC's post-2019 discovery requests relate to matters outside the scope of these proceedings – namely, the legitimacy of "the PPA Rider mechanism" itself (Mem. Supp.

Interlocutory Appeal at 4) – the Attorney Examiner's ruling denying that irrelevant discovery does not in any way depart from the Court's ruling in *In re FirstEnergy Advisors*. OCC has not satisfied the first element of the test for certifying an interlocutory appeal under Ohio Adm.Code 4901-1-15(B), because OCC has not demonstrated that the Attorney Examiner's denial of discovery of information developed after the 2018-2019 audit proceedings is contrary to either the Commission's or the Supreme Court of Ohio's precedent. For this reason alone, certification of an interlocutory appeal must be denied.

B. OCC also has not demonstrated that the December 23rd Entry will unduly prejudice it.

OCC also has not met the second requirement for certification of an interlocutory appeal: undue prejudice absent an immediate determination. OCC suggests that the December 23rd Entry will prevent it from presenting "adequate information" at hearing. (*See* OCC Mem. Supp. Interlocutory Appeal at 8.) But OCC misses the point of the prejudice analysis that the Attorney Examiner must make under Rule 4901-1-15(B). The "immediate determination" criterion for certification of an interlocutory appeal does not ask whether the ruling in question will cause "undue prejudice or expense" to the movant if left in place. Ohio Adm.Code 4901-1-15(B). It asks whether the Commission must address the question *now*, rather than later:

> Because an immediate ruling is essential only where the potential for undue prejudice and expense exists, the rule should require that a party establish the need for an immediate Commission determination before any interlocutory appeal will be entertained.

In re Amendment of Chapter 4901-1 of the Ohio Administrative Code and the Rescission of Certain Provisions of Chapter 1551:1-7 of the Ohio Administrative Code, Case No. 87-84-AU-ORD, 1987 Ohio PUC LEXIS 49, ¶ 13 (Oct, 14, 1987). In other words, "the rule requires a showing that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission were ultimately

to reverse the ruling in question." *In re the 2018 Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case Nos. 18-501-EL-FOR *et al.*, Entry ¶ 38 (Nov. 13, 2018).

OCC does not explain how it, or AEP Ohio's customers, would be unduly prejudiced if the Commission addresses OCC's objections to the December 23rd Entry in a post-hearing opinion and order, even if that opinion and order ultimately holds that the December 23rd Entry was improper and requires additional discovery and rehearing. OCC asserts, instead, that "OCC (and consumers) will be unduly prejudiced by having to continue paying unjust and unreasonable charges to subsidize the [OVEC] plants." (Mem. Supp. Interlocutory Appeal at 8.) That is an argument that the December 23rd Entry prejudiced OCC and AEP Ohio's customers, not that *waiting* would prejudice OCC and AEP Ohio's customers. OCC also disregards the fact that the charges it is challenging are historical (they were paid in 2018-2019) and relate to a rider that expired two years ago. As noted above, OCC and AEP Ohio's customers currently pay charges under the Legacy Generation Resource (LGR) Rider established under R.C. 4928.148(A). The Commission's review of the December 23rd Entry would not affect the charges customers are currently paying under the LGR Rider even if the Commission ultimately reversed that Entry.

OCC has not demonstrated that an immediate determination on the December 23rd Entry is required to avoid undue prejudice. Because OCC has not satisfied the second element of the test for certifying an interlocutory appeal, certification must be denied.

III. The Commission Should Deny OCC's Request to Reverse or Modify the Attorney Examiner's December 23rd Entry.

If the Attorney Examiner does certify OCC's interlocutory appeal – and she should not – the Commission should deny OCC's request to reverse or modify the December 23rd Entry.

The purpose of these proceedings is to review the "prudence and performance" of expenses recovered through AEP Ohio's PPA Rider for calendar years 2018 and 2019. Entry

¶¶ 4, 7 (Oct. 5, 2021). A prudency review is "a retrospective, factual inquiry." *In re Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC, Opinion and Order (Aug. 20, 2014) (citation omitted). It is, in other words, "backward-looking." *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶ 32. In such a review, "a prudent decision is 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." *In re Application of The Dayton Power and Light Company*, Opinion and Order at 6 (Aug. 20, 2014), citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999) (further citation omitted).

OCC's arguments flip the prudency standard on its head. OCC wants the Commission to review the PPA Rider charges from 2018 and 2019 based on what "information from 2020 and 2021" says about the likelihood of *future* OVEC-related credits for consumers. (Mem. Supp. Interlocutory Appeal at 2, 4.) That is not a prudency review. It is a prospective, or forward-looking, review of the PPA Rider. Beyond that, it is an attempt to relitigate the inclusion of the OVEC PPA in the PPA Rider five years ago. Moreover, as noted above, the PPA Rider was already replaced by the General Assembly and any discussion of modifying the PPA Rider going forward is moot and academic. The Attorney Examiner has separately held that relitigating the *PPA Rider Cases* is not a permissible use of discovery in this proceeding, and OCC has not challenged that holding. (*See* December 23rd Entry at ¶ 15.) The Commission should affirm that holding, along with the remainder of the December 23rd Entry.

IV. CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission decline to certify the Office of the Ohio Consumers' Counsel's interlocutory appeal or, in the alternative, affirm the December 23rd Entry.

Respectfully submitted,

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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 Memorandum in Opposition to the Office of the Ohio Consumers' Counsel's Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application For Review* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 3rd day of January, 2022, via e-mail.

/s/ Steven T. Nourse
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Summary: Memorandum Ohio Power Company's Memorandum in Opposition to the Office of the Ohio Consumers' Counsel's Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application For Review electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company