

**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.)	

**OHIO POWER COMPANY’S
MOTION TO STRIKE SPECIFIED INTERVENOR TESTIMONY**

Pursuant to Ohio Adm.Code 4901-1-12, Ohio Adm.Code 4901-1-27(B)(4) and (B)(7)(b) and (d), Ohio Power Company (“AEP Ohio” or the “Company”) respectfully moves for an order striking testimony filed by witnesses for the Office of the Ohio Consumers’ Counsel (“OCC”), Ohio Manufacturers’ Association Energy Group (“OMAEG”), and Natural Resources Defense Council (“NRDC”) that relates to matters that are outside the scope of these proceedings; relies on information developed after the audit period in these proceedings; or relies on expert opinions, deposition testimony, and other discovery responses from third parties in other proceedings. The testimony to be struck and the grounds for this motion are more fully described in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

The Commission's procedural rules grant attorney examiners the authority to "[r]ule on objections, procedural motions, and other procedural matters" and to "[t]ake such actions as are necessary to * * * [p]revent the presentation of irrelevant or cumulative evidence." Ohio Adm.Code 4901-1-27(B)(4) and (7)(b). AEP Ohio asks the Attorney Examiners in this proceeding to exercise that authority with regard to the witness testimony prefiled in these proceedings on behalf of intervenors OCC, OMAEG, and NRDC on December 29, 2021.

A review of the prefiled testimony of OCC witness Devi Glick and Mike Haugh, OMAEG witness John Seryak, and NRDC witness Jeremy Fisher reveals that the intervenors' witnesses intend to offer dozens of pages of evidence and testimony exhibits that relate to irrelevant matters outside the scope of this proceeding, including: AEP Ohio's PPA Rider charges before the audit period; LGR Rider charges after the audit period; whether the OVEC PPA should have been included in the PPA Rider or LGR Rider in the first place; and whether the PPA Rider or LGR Rider should be terminated now. The intervenors' witnesses also rely on, and in several instances attach to their testimony, numerous categories of improper hearsay materials, including reports, forecasts, policies, and other information that pertains to 2020 and 2021 and deposition testimony, discovery responses, and expert testimony from third parties in other proceedings. Testimony on the listed irrelevant topics, and testimony that relies on improper hearsay and information developed after the audit period, is improper and should be struck from the witnesses' filed testimony.

II. The Commission Should Strike Portions of the Intervenor Testimony That Raise Issues Outside the Scope of These Proceedings or Rely on (and in Some Instances Attach) Evidence Not Properly Admissible in These Proceedings.

AEP Ohio identifies certain portions of Intervenor testimony that should be struck for the following four independent reasons. Some portions of testimony should be struck on multiple grounds.

A. Neither the PPA Rider charges from 2016 and 2017 nor the LGR Rider charges from 2020 forward are proper topics for testimony in these proceedings.

On October 5, 2021, the Attorney Examiner issued an Entry setting these proceedings for hearing. The purpose of these proceedings, as indicated in that and other entries, is to conduct an “audit of AEP Ohio’s PPA Rider for the period of January 1, 2018, through December 31, 2019.” October 5th Entry at ¶ 6.

However, some of the intervenors’ witnesses have attempted to offer opinions regarding OVEC-related charges before and after the audit period. Mike Haugh, on behalf of OCC, proposes to offer testimony regarding the PPA Rider charges in 2016 and 2017 (Haugh Testimony at 6:22 and 34:1-8) and whether the OVEC PPA “likely will * * * result in any net credit for consumers” going forward (*id.* at 33:21-22). Devi Glick, also on behalf of OCC, proposes to offer testimony regarding the difference between OVEC costs and market prices “[i]n future years” (Glick Testimony at 34:3), whether “the OVEC PPA will * * * be able to effectively hedge prices in the future” (*id.* at 42:18), the costs that OVEC will incur to comply with U.S. Environmental Protection Agency regulations in the future (*see, e.g., id.* at 7:13-20), how old the OVEC units will be when the current ICPA expires (*see id.* at 14:5-10), and whether the continued operation of the OVEC units is consistent with industry trends for coal-fired generation (*see id.* at 14:12 – 15:9). And Jeremy Fisher, witness for Natural Resources Defense

Council (NRDC), proposes to offer testimony regarding AEP Ohio’s OVEC-related rider charges “on a going-forward basis.” (Fisher Testimony at 39:18-19.)

These are not relevant topics for testimony in these proceedings. The PPA Rider charges in 2016 and 2017 are the subject of a different, pending proceeding, Case No. 18-1003-EL-RDR. The Legacy Generation Resource (LGR) Rider charges for 2020 are also the subject of a different, pending proceeding, Case No. 21-477-EL-RDR. And AEP Ohio’s recovery of prudently incurred costs related to its ownership interest in OVEC going forward is governed by R.C. 4928.148(A)(1) and subject to review in future audits. *See In re the OVEC Generation Purchase Rider Audits Required by R.C. 4928.148 for Duke Energy Ohio, Inc., The Dayton Power and Light Company, and AEP Ohio*, Case No. 21-477-EL-RDR, Entry at ¶ 5 (May 5, 2021). Accordingly, AEP Ohio moves to strike the following testimony relating to PPA Rider charges before the audit period; actual or likely LGR Rider charges after the audit period; or the continued operation of the OVEC units in the future:

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Mike Haugh	6:18-21	"The PUCO should disallow all PPA Rider costs based on the auditor’s finding that OVEC’s costs are above the Levelized Cost of New Entry and therefore the plants “are not viable” (i.e., cannot be expected to produce a credit for consumers)."
OCC	Mike Haugh	6:22	"5. The PUCO should disallow the 2016 and 2017 OVEC charges"
OCC	Mike Haugh	32:13 - 33:22	Heading D. and all of Q&A 43 and Q&A 44
OCC	Mike Haugh	34:1-8	Heading E. and all of Q&A 45

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	7:13-20	All of paragraph 5.
OCC	Devi Glick	8:4-12	All of paragraph 4.
OCC	Devi Glick	8:13-19	All of paragraph 5.
OCC	Devi Glick	14:5-10	All of Q&A 18
OCC	Devi Glick	14:12-16:5	All of Q&A 19 and Figure 1
OCC	Devi Glick	34:1-4	All of Q&A 31
OCC	Devi Glick	42:17-18	“and based on my review of available alternatives and market price trends the OVEC PPA will not be able to effectively hedge prices in the future.”
OCC	Devi Glick	59:8-11	"Finally, the Company also did not present any evidence of analysis on the cost of complying with the EPA’s Coal Combustion Residuals and Effluent Limitation Guideline rules. Instead, the Company rejected to OCC’s efforts to get this information."
OCC	Devi Glick	59:13 - 60:4	All of Q&A 55
OCC	Devi Glick	61:7 - 62:4	All of Q&A 57
OCC	Devi Glick	62:8-14	All of Q&A 58
NRDC	Jeremy Fisher	39:18-19	“or on a going-forward basis”

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
NRDC	Jeremy Fisher	46:20 - 47:2	"Q. How could AEP Ohio reflect the Auditor's opinion for the benefit of its customers? "A. AEP Ohio could remove the OVEC plants -- i.e., the PPA Rider -- from customer rates. Irrespective of if the plants continue to operate, AEP Ohio should not charge customers for the costs of these plants. Removing the PPA Rider from rates would be consistent with the Auditor's recommendation."
NRDC	Jeremy Fisher	47:8	"and on an ongoing basis"

B. Testimony relying on information from after the audit periods is improper.

The Attorney Examiner's December 23rd Entry held that OCC was 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" and thus "such information is not relevant to the subject matter of these cases * * * ." December 23rd Entry at ¶ 15. The Attorney Examiner declined to certify an interlocutory appeal of that holding on January 5, 2022.

Despite that holding, OCC witness Glick relies on numerous pieces of information from the post-audit period to support her proposed testimony, including:

- A comparison of "OVEC power costs and revenues under the OVEC Agreement vs. market prices" for 2020, relying in part on PJM locational marginal pricing, hourly load data, and capacity prices from PJM for 2020 (Glick Testimony at 20:1-15, Table 2 and Note);
- Potential alternative costs for similar services, based on Consumers Energy's billing statements to Michigan Public Power Agency from 2020 for power from two generating plants in Michigan (*id.* at 29:1-2, Table 3, "Cost of similar services," and nn.2-3; *id.*, Q&A 27, at 30:5 - 31:4);

- “The PJM value of CONE [Cost of New Entry] for a new combined cycle unit,” based on PJM’s Default MOPR Floor Offer Prices for New Generation Capacity Resources from March 2020 (*id.* at 29:1-2, Table 3, “PJM Base Residual Auction,” and n. 5; *id.*, Q&A 28, at 31:6 – 32:7);
- Prices for renewable energy from Indiana Michigan Power’s 2021 Integrated Resource Plan and the February 2020 results from a Request for Proposals by NIPSCO (*id.* at 29:1-2, Table 3, “Replacement resource PPA prices,” and nn. 7-8);
- “[T]he cleared capacity value (auction price) from PJM’s most recent 2022/2023 Base Residual Auction” in 2021 (*id.*, Q&A 29, at 32:9-15 and n.31);
- Expected trends in “[c]apacity prices * * * moving forward,” based on, among other data, PJM’s 2023/2024 RPM Base Residual Auction Planning Period Parameters and a May 2021 Interconnection Process Reform Task Force Update (*id.*, Q&A 30, at 33:1-14);
- Actual charges under the PPA Rider in 2020 and total charges “between 2016 and 2020” (*id.*, 39:7; Figure 4, “2020” and related data points, at 40:1-3; and 43:7-8); and
- “[T]he cumulative difference between the credits that AEP Ohio projected to pass on to consumers and the charges that it has actually passed on to consumers between 2016 and 2020” (*id.* at 40:19-1 and Figure 5, “2020” and related data points, at 41:5-6).

Accordingly, AEP Ohio moves to strike (and, where necessary, modify) the following testimony by Ms. Glick that relies on reports, forecasts, policies, and other information that pertains to 2020 and 2021:

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	5:18	"(2) OVEC's 2020 annual report;"
OCC	Devi Glick	19:7	" over the past five years <u>between 2015 and 2019</u> "
OCC	Devi Glick	20:2-15, Table 2 (specified portions)	<ul style="list-style-type: none"> • Data for 2020 • “OVEC annual report 2020” • “Capacity prices from PJM State of the Market Reports 2014-2020-<u>2019</u>”

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	29:1 - 30:2, Table 4 (specified portions)	<ul style="list-style-type: none"> • <u>Cost of similar services</u>: entire row and nn. 2-3; • <u>Value of CONE & PJM Base Residual Auction</u>: PJM Base Residual Auction row and n.5; • <u>Replacement resource PPA prices</u>: I&M renewable RFP results and NIPSCO RFP Results and nn. 7-8
OCC	Devi Glick	30:5 - 31:4	All of Q&A 27
OCC	Devi Glick	31:12 – 32:17 and n.29	<ul style="list-style-type: none"> • The third sentence of A28 forward, starting with "The PJM value of CONE for a new combined cycle unit is \$320/MW-Day and for a new combustion turbine unit it is \$294/MW-Day" • All of Q&A 29
OCC	Devi Glick	33:1-14 and nn. 32-33	All of Q&A 30
OCC	Devi Glick	39:7 and Figure 4 (post-2019)	<ul style="list-style-type: none"> • "the PPA Rider has actually incurred substantial <i>charges</i> each year totaling \$[redacted] Million between 2016 and 2020 <u>2019</u>" • In Figure 4, the line showing actual performance between 2019 and 2020 • In the Note to Figure 4, the citations to OVEC annual report 2020 and PJM State of the Market Report 2020

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	40:18 – 41:3 and Figure 5 (post-2019)	<ul style="list-style-type: none"> • "Figure 5 shows the cumulative difference between the credits that AEP Ohio projected to pass on to consumers and the charges that it has actually passed on to consumers between 2016 and 2020<u>2019</u>. In total, there was a \$[redacted] Million difference between the credits that AEP Ohio expected to earn and the charges that it actually incurred between 2016 and 2020 <u>2019</u>" • In Figure 5, the portion of the chart between 2019 and 2020 and the cumulative difference
OCC	Devi Glick	43:7	"the PPA Rider has generated a \$[redacted] million charge to consumers between 2016 and 2020 <u>2019</u> "

C. Challenges to the Commission’s prior decision to include the OVEC PPA in the PPA Rider are not a proper topic of testimony in these proceedings.

Much of the post-2019 information and reports discussed in the prior section were put forward by OCC witness Glick to support arguments against the approval of the PPA Rider itself. This is not surprising, given OCC’s prior briefing regarding its right to “discovery of information that occurred or was prepared after the audit period.” (OCC Memo Contra AEP Ohio Mot. for Prot. Order at 16 (Dec. 20, 2021).) In that briefing, OCC explained that it believed post-2019 information would show that AEP Ohio’s original 2016 projections were faulty and that “the OVEC charges will never be a credit,” which OCC believed would support an argument that “collection of any above-market charges for 2018 or 2019 * * * would be unjust and unreasonable.” (*Id.* at 16-17.)

The Attorney Examiner granted AEP Ohio’s motion for protective order with regard to that discovery, holding that “[i]nformation regarding the basis for AEP Ohio’s decision to include the OVEC PPA in the PPA Rider is * * * beyond the scope of these proceedings, as the Commission has already authorized the OVEC agreement’s inclusion in the rider in the *PPA Rider Case* [Case Nos. 14-1693-EL-RDR, *et al.*] and, more recently, approved the continuation of the rider in the *ESP 4 Case* [Case Nos. 16-1852-EL-SSO, *et al.*].” December 23rd Entry at ¶ 15. And this past week, the Attorney Examiner again rejected OCC’s argument that “the Commission should consider ‘current evidence’ of OVEC’s actual costs in relation to original projections” as a basis for reconsidering the Commission’s decision to include the OVEC PPA in the PPA Rider. Entry ¶ 14 (Jan. 5, 2022).¹ In particular, the Attorney Examiner noted that “the Commission fully considered, in the *PPA Rider Case*, OCC’s arguments regarding the rider’s costs.” *Id.* ¶ 19, citing *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 105, Second Entry on Rehearing (Nov. 3, 2016) at ¶¶ 271, 278-280.

The January 5 Attorney Examiner Entry was consistent with the Commission’s 2016 decision in the *PPA Rider Case* and with the Supreme Court of Ohio’s 2018 decision affirming the Commission decision. *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698. Four intervenor witnesses nonetheless propose to testify, at length, that the Commission should reconsider its authorization of the PPA Rider (or the LGR Rider) based on new evidence and analysis.

¹ OCC argued that discovery regarding “earlier projections of OVEC costs * * * is relevant to * * * whether the PPA Rider actually serves as a hedge. If the evidence shows net credits to customers are not likely, the PUCO could conclude that the OVEC costs are unjust and unreasonable.” (Mem. Supp. Interlocutory Appeal at 5-6 (Dec. 28, 2021).)

Glick, OCC's witness, fills two sections (Sections IV and V) and almost thirty pages (pages 17 to 45) of testimony arguing that the Commission should "disallow the \$75.5 million in above-market costs" (Glick Testimony at 35:1) because:

- "OVEC's costs are substantially higher than PJM market prices for the same energy, capacity, and ancillary services during the audit period" (*id.* at 18:4-5; *see generally id.*, Section IV.A., at 18-26);
- Other "resource[s] * * * could have been used as a hedge against the SSO price under the Power Purchase Agreement Rider * * * at a much lower cost" and it was "imprudent" not to conduct a "competitive bidding process before selecting the OVEC plants" (*id.* at 34:11-20; *see generally id.*, Section IV.B., at 27-35, and Q&A 35, at 38:1-10); and
- "AEP Ohio substantially over-projected the net benefits that the Power Purchase Agreement would deliver to its consumers in 2016 when it first applied for the Rider" (*id.* at 38:15-17), whereas other contemporaneous analyses "showed that the costs of the OVEC plants would exceed PJM revenues by a substantial amount" (*id.* at 44:7-8) (*see generally id.*, Section V, at 35-45).

OCC's other witness, Haugh, offers essentially the same opinions:²

- "AEP Ohio has produced no evidence to show that they performed any type of competitive bidding process before selecting the OVEC plants as an economic hedge" and therefore "cannot establish that the OVEC costs are just, reasonable and prudent" (Haugh Testimony at 12:4-10; *see also id.* at Q&A 17);
- The Commission erred in "accept[ing] AEP's projections" on whether the PPA Rider would provide credits or charges to consumers (*id.* at 14:9; *see also id.* at Q&A 19);
- "The PUCO should disallow all OVEC costs because the actual OVEC costs have been much higher than original projections and it is clear now that the PPA Rider will not be a net credit over the lifetime of the rider" (*id.* at 6:12-14; *see also id.* at Q&A 24-26, Q&A 31-32);
- "In reality, the hedge seems to be a government-sanctioned device for subsidizing AEP Ohio utilities' uneconomic generation. * * * Justifying the hedge as a benefit for consumers is a cynical characterization for a regulation that instead is bailing out the utilities" (*id.* at 18:5-6 and 19:5-6); and

² If the Attorney Examiner does not strike the referenced portion of Haugh's testimony because it relates to matters outside the scope of these proceedings, AEP Ohio would move to strike it as redundant of Glick's testimony, especially since Mr. Haugh does not appear to have done any independent calculations or quantitative analysis of his own to add. *See* Ohio Adm.Code 4901-1-27(B)(7)(b) (authorizing attorney examiners to "[t]ake such actions as are necessary to * * * Prevent the presentation of * * * cumulative evidence.").

- “The PUCO should * * * disallow all PPA Rider costs” because “OVEC’s costs are substantially higher than the LCOE [Levelized Cost of Entry] and the LCOE is a proxy for market price, [meaning] the PPA Rider likely will not result in any net credit for consumers” (*id.* at 33:20-22; *see also generally* Q&A 44).

So does Jeremy Fisher, witness for NRDC. Fisher opines that AEP Ohio should be required to refund the entirety of the PPA Rider charges (*see* Fisher Testimony at 39:6-25) because “[t]he OVEC contract * * * does not provide an efficient hedge against market prices,” because there are lower-cost alternatives, and because the “OVEC contract has been a net loss for OVEC’s sponsors” during the audit period (*id.* at 6:13-21; *see also id.* at 32:18-39:25). And so does John Seryak, the witness for OMAEG. Seryak opines that the Commission’s rulings in the *PPA Rider Case* “expressed * * * that Rider PPA must not only include costs associated with OVEC if it results in net costs to customers” *and* reserved the Commission’s right to “modify its approval of Rider PPA” based on new circumstances. (Seryak Testimony at 10:5-15; *see also generally* Q&A 7 - 16). He then opines “that Rider PPA * * * is neither functioning as a financial hedge nor a rate stabilization charge [a]nd therefore, the costs collected through Rider PPA during the audit period * * * should be disallowed in their entirety * * * .” (*Id.* at 4:1-5; *see also* Q&A 17 and 27:6-9.) Seryak adds that the Commission should not have allowed AEP Ohio to collect “debt and interest payments for OVEC and OVEC shareholder profits” through the PPA Rider (*id.* at 17:4-5) and, consequently, should refund that money to customers (*see id.* at 27:1-5).

Per the Attorney Examiner’s December 23rd and January 5th Entries, this audit proceeding is not an opportunity for the intervenors to relitigate the Commission’s original decision to include the OVEC PPA in the PPA Rider. The Commission already determined that the PPA Rider will act as a financial hedge during the 2018-2019 audit period and the Supreme Court already affirmed that the Commission’s decision was lawful and supported by the ESP statute provisions relied upon. Accordingly, AEP Ohio moves to strike the following testimony:

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	4:4-8	"Next, I review AEP Ohio's projections for how much it would charge consumers under the Power Purchase Agreement Rider in 2018 and 2019 and compare those projections to other contemporary analysis assessing the long-term cost of remaining in the OVEC Agreement, and to the costs AEP Ohio actually paid."
OCC	Devi Glick	4:18 - 5:2	"In Section 4, I evaluate the costs paid by AEP Ohio's consumers under the Power Purchase Agreement Rider in 2018 and 2019. I discuss how AEP Ohio has paid unreasonable charges significantly above the market value of energy and capacity in PJM to OVEC, and now seeks to pass on these excess costs to its consumers through the Power Purchase Agreement Rider. I present several different metrics that can be used to value the services provided by OVEC."
OCC	Devi Glick	5:4-5	"In Section 5, I review contemporaneous analysis conducted by AEP Ohio and other OVEC sponsors on the OVEC plants economics' during audit period."
OCC	Devi Glick	6:17-22	All of paragraph 2. in A10
OCC	Devi Glick	7:25-28	All of paragraph 1. in A11
OCC	Devi Glick	11:9-17	All of Q&A 14
OCC	Devi Glick	27:1 – 35:2	All of Q&A 26 through Q&A 32
OCC	Devi Glick	35:4 – 43:2	All of Q&A 33 through Q&A 38
OCC	Devi Glick	44:5 - 45:18 and DG-2 and DG-3	Q&A 40

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	59:4-6	"There is also no evidence that the Company re-evaluated the prudence of using the OVEC units as a hedge on the SSO price, or that the Company solicited any competitive bids for a PPA to provide an alternative hedge service."
OCC	Mike Haugh	6:12-14	"2. The PUCO should disallow all OVEC costs because the actual OVEC costs have been much higher than original projections and it is clear now that the PPA Rider will not be a net credit over the lifetime of the rider."
OCC	Mike Haugh	8:2-4	"For AEP Ohio to claim that its consumers will benefit financially with a net credit from the OVEC arrangement is fiction in my view."
OCC	Mike Haugh	12:1 - 13:14	All of Q&A 17
OCC	Mike Haugh	14:1-15	All of Q&A 19
OCC	Mike Haugh	17:7 - 19:13	All of Q&A 25 through Q&A 27
OCC	Mike Haugh	25:1 - 26:14	All of Q&A 31 through Q&A 32
OCC	Mike Haugh	32:13 - 33:22	Section D and all of Q&A 43 through Q&A 44
OMAEG	John Seryak	4:1-5	"● that Rider PPA as implemented by AEP Ohio is neither functioning as a financial hedge nor a rate stabilization charge. And therefore, the costs collected through Rider PPA during the audit period are unreasonable, imprudent, and not in customers' best interests and should be disallowed in their entirety and refunded to customers; and,"
OMAEG	John Seryak	4:20 -14:14	All of Q&A 7 through Q&A 17
OMAEG	John Seryak	17:1 - 26:8	All of Q&A 20 through Q&A 30

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OMAEG	John Seryak	27:6-9	“● The PUCO find that Rider PPA as implemented by AEP Ohio is not functioning as a financial hedge, is thus not a rate stabilization charge, and that the costs collected by Rider PPA be disallowed in their entirety and refunded to customers.”
NRDC	Jeremy Fisher	6:13-21	All of paragraph 4.
NRDC	Jeremy Fisher	8:27-28	", and act on those findings to remove the OVEC plants from rates during the audit period, and on a going-forward basis."
NRDC	Jeremy Fisher	32:18 - 39:25	Section 5., titled: "OVEC Has Not Acted as a Cost-Effective 'Hedge' Against Market Prices"
NRDC	Jeremy Fisher	47:6-8	", and act on those findings to remove the OVEC plants from rates during the audit period, and on a going-forward basis."

D. It is improper for the intervenor witnesses to rely on testimony and discovery from other proceedings and attach that testimony and discovery to their own testimony.

Lastly, the intervenor witnesses also rely heavily on written discovery responses, deposition testimony, submitted reports, and hearing testimony from other OVEC-related proceedings in various jurisdictions, including federal court and other state commissions.

At one point, OCC and OMAEG moved to consolidate the hearings on AEP Ohio’s and Duke Energy Ohio’s OVEC-related rider charges, arguing that the cases were “overlapping,” presented “[t]he same or similar issues,” involved the same auditor, and “would likely [share] the same witnesses.” (Joint Motion for a Consolidated Hearing at 8 (July 8, 2021).) After AEP Ohio and Staff opposed the consolidation, OCC and OMAEG withdrew that motion.

Instead, OCC and OMAEG’s witnesses and NRDC’s witness have chosen simply to introduce audit findings and testimony and discovery responses from the Duke Energy Ohio audit proceeding, along with testimony from proceedings before other tribunals entirely. OCC witness Glick explains that her analysis relies in part on “information filed with the U.S. Bankruptcy Court when FirstEnergy Solutions [FES] attempted to cancel its obligations under the OVEC Agreement,” her own testimony in the Duke Energy Ohio audit proceeding, and Duke Energy Ohio’s discovery responses from its audit proceeding. (Glick Testimony at 5:16 – 6:8; *see also id.* at 44:17 – 45:18 and 55:1 – 56:8.) Glick goes so far as to attach two entire declarations from the FES bankruptcy case – an “expert declaration” by Judah Rose of ICF International, and a related declaration from FES’s Vice President, neither of whom are witnesses in this proceeding – to her testimony. (*See id.*, Attachments DG-2 and DG-3.) She also summarizes, but does not attach, an analysis Rose provided in Duke Energy Ohio’s 2018 Price Stabilization Rider case. (*See id.* at 44:11-15.) OMAEG witness Seryak, in turn, quotes from the audit report in the Duke Energy Ohio audit proceeding. (*See Seryak Testimony* at 15:2-4 and n.33.) And NRDC witness Fisher quotes at length from the deposition of John Swez in the Duke Energy Ohio proceeding (also not a witness in this proceeding) and attaches Swez’s deposition testimony to Fisher’s hearing testimony. (*See Fisher Testimony* at 20:13 – 21:3, 27:7-18, and Exhibit JIF-9.) Fisher also cites his own prior testimony in a 2019 Michigan proceeding. (*See id.* at 35:15-17 and n. 67.) This wholesale importation of opinion testimony, deposition testimony, and discovery responses from other cases is inadmissible hearsay and goes well beyond standard practice in Commission proceedings.

To begin, nothing in the Commission’s rules allows one expert witness to submit another, unaffiliated person’s expert testimony from a different proceeding simply by attaching it to the

first witness's testimony. The Commission "may look to the Ohio Rules of Evidence for guidance" in determining "what qualifies as expert testimony * * * ." *Forest Hills Supermarket, Inc. d/b/a Konnis Family Foods v. The Cleveland Electric Illuminating Co.*, Case No. 18-785-EL-CSS, Opinion and Order ¶ 35 (Apr. 8, 2020). Under the Ohio Rules of Evidence, the "facts or data * * * upon which an expert bases an opinion or inference may [only] be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 703. Generally, "[t]he rule requirement of 'perceived by the expert' refers to personal knowledge." (Citations omitted.) *Worthington City Sch. v. ABCO Insulation*, 84 Ohio App. 3d 144, 153, 616 N.E.2d 550 (1992). Thus, the Supreme Court of Ohio has held that "it [is] error to admit * * * expert opinion testimony based on * * * reports and records which were not prepared by the expert witnesses and not admitted in evidence." *State v. Jones*, 9 Ohio St.3d 123, 125, 459 N.E.2d 526 (1984). Even under the Federal Rules of Evidence, which allow experts greater latitude in the information on which they base their opinions, an expert witness cannot simply submit another expert's testimony into evidence. Federal Rule of Evidence 703 does not "extend[] so far as to allow an expert to testify [at a trial] about the conclusions of other" persons who have not been qualified as expert witnesses in, or appeared at, that trial. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 409 (6th Cir.2006), citing *Taylor v. B. Heller & Co.*, 364 F.2d 608, 613 (6th Cir.1966) (other citations omitted).

The witnesses' reliance on discovery responses from the Duke Energy Ohio audit proceeding also would violate the Commission's procedural rules. The use of Swez's deposition testimony from the Duke Energy Ohio proceeding as evidence in this case is strictly prohibited by Ohio Adm.Code 4901-1-21(N), which allows the use of depositions in Commission hearings only "to the same extent permitted in civil actions in courts of record." Ohio's Civil Rules do

not allow the introduction into evidence of a third party's deposition testimony for use against a party that was not present or represented at the deposition or notified about the deposition in advance, and without any demonstration that the deponent is unavailable to testify at the hearing in these proceedings. *See* Civ.R. 32(A). Another attorney examiner recently noted that "it is not very common that the Bench entertains motions to admit deposition testimony," *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Tr. Vol. II at 347 (Apr. 4, 2018), and that doing so "makes it incredibly difficult to judge the credibility of a witness, especially when there have been no assertions that th[e] witness was unable to provide live testimony during the hearing" (*id.*, Tr. Vol. III, at 361 (Apr. 5, 2018)).

Finally, the Commission's rules allow parties to use interrogatory responses only "to the extent permitted by the rules of evidence * * *." Ohio Adm.Code 4901-1-19(B). Under Ohio's Evidence Rules, Duke Energy Ohio's interrogatory responses in its audit proceeding are inadmissible hearsay. *See* Evid.R. 801(C) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") and Evid.R. 802 (stating that "[h]earsay is not admissible"). There is no hearsay exception that allows OCC or NRDC to use Duke Energy Ohio's discovery responses from another proceeding against AEP Ohio in these proceedings.

Accordingly, AEP Ohio moves to strike the following testimony and exhibits, all of which rely on opinion testimony, deposition testimony, or discovery responses from other administrative or judicial proceedings:

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
OCC	Devi Glick	5:19 – 6:3	"(4) information filed with the U.S. Bankruptcy Court when FirstEnergy Solutions attempted to cancel its obligations under the OVEC Agreement; (5) the Public Version of my Direct Testimony in Case No. 20-0167-EL-RDR relating to Duke Energy Ohio's Price Stabilization Rider; (6) Public Discovery Responses from Case No. 20-0167-EL-RDR;"
OCC	Devi Glick	44:5 – 45:18 and DG-2 and DG-3	All of Q&A 40
OCC	Devi Glick	55:1-8, nn. 67-68, and DG-07 and DG-08	“Public discovery responses from Case No 20-167-EL-RDR indicated that in 2019, OVEC did not conduct analysis on a daily basis to inform its unit commitment process. The decision to move to a daily analysis system was not made until 2020. ⁶⁷ Instead, during 2018 and 2019, the available OVEC plants (except Clifty Creek Unit 6 during summer ozone non-attainment periods) were committed into the PJM day-ahead market with a ‘Must-Run’ status at all times, except when units were unavailable due to scheduled maintenance or forced outages. ⁶⁸ ”
OCC	Devi Glick	55:10 - 56:2	All of Q&A 50
OMAEG	John Seryak	15:2-4 and n.33	"LEI auditors [in the Duke Energy Ohio audit proceeding] have determined that OVEC’s Clifty Creek unit paid above-market prices for coal, and ‘recommend[ed] [that] OVEC negotiate with the coal suppliers to ensure the delivery of coal with good quality but at more competitive prices.’” ³³

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
NRDC	Jeremy Fisher	20:13 - 21:3 and nn. 32-33 and Exhibit JIF-9	<p>"Tellingly, John Swez, Duke Energy Ohio's representative to the OVEC Operating Committee, testified in a deposition conducted as part of Duke Energy Ohio's OVEC rider proceeding that there were periods throughout 2019 when he assessed that OVEC's 'must-run' directives would result in losses at the OVEC units.³² Mr. Swez describes a 'profit and loss' assessment similar to that described by AEP's Scott Mertz, an assessment that AEP Ohio could also conduct. Despite the findings that the OVEC units were likely to sustain protracted losses in 2019, the OVEC units retained a 'must-run' directive and were continuously committed.</p> <p>Q. Now, going back to 2019, were there ever any times when the Duke forecast of the expected profit and loss for the OVEC plants showed that the revenues from the PJM day-ahead energy market might not cover the plants' variable operating costs?</p> <p>A. Yes.³³"</p>
NRDC	Jeremy Fisher	21:10-11	", as described by Duke's Mr. Swez"
NRDC	Jeremy Fisher	27:7-18, nn. 47-48 and Exhibit JIF-9	<p>"In deposition, Duke's liaison to the Operating Committee, Mr. Swez, describes that after assessing losses at OVEC on the energy market, he moved to notify OVEC, and subsequently the other Sponsors that they should re-evaluate the commitment process. He states:</p> <p>I mentioned in 2020, during COVID when I noticed, we monitor, and I saw the revenues not exceeding the variable costs, I notified OVEC. So that's what I would call a – a notice to OVEC that I believe now we need to change the commitment.⁴⁷</p>

<u>Intervenor</u>	<u>Witness</u>	<u>Testimony</u>	<u>Text to be Struck or Modified</u>
			Similarly, he discusses that even prior, he had ‘brought up’ that the Operating Committee ‘need[ed] to work on creating a new process that starts to include periods where we may use a commitment status offer of economic in addition to must run.’ ⁴⁸ He goes on to say that “it was generally received pretty favorably.” ⁴⁹
NRDC	Jeremy Fisher	35:15-16 and n.67	"-- and in fact for nearly every month since the Commission's 2016 authorization ⁶⁷ --"

III. CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission grant its motion to strike the cited portions of the pre-filed testimony of OCC witnesses Devi Glick and Mike Haugh, OMAEG witness John Seryak, and NRDC witness Jeremy Fisher.

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 Motion to Strike Specified Intervenor Testimony* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 7th day of January, 2022, via e-mail.

/s/ Steven T. Nourse

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