BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company	)))	Case No. 18-1003-EL-RDR

OHIO POWER COMPANY'S MEMORANDUM CONTRA INTERVENOR APPLICATIONS FOR REHEARING

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I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") should deny the Application for Rehearing by Office of the Ohio Consumers' Counsel's ("OCC AfR") and the Joint Application for Rehearing of the Ohio Manufacturers' Association Energy Group and The Kroger Co. ("OMAEG/Kroger AfR"), both of which improperly challenge the Commission's lawful and reasonable April 20, 2022 Finding and Order ("Order").

As an initial matter, because OCC and OMAEG/Kroger failed to raise several arguments in the merit stage of this proceeding, they have waived the arguments and failed to adequately develop the claims or support them at the merit stage of the case for the Commission's timely consideration (OCC Assignments of Error 1, 2 and 4 and OMAEG/Kroger Assignments of Error 1, 2, and 4). OCC and OMAEG/Kroger attempt to alter their merit claims by asserting this new argument at the rehearing stage of the proceeding. Under similar circumstances, the Commission has held that rehearing should be denied for that reason:

> Initially, we note our agreement with Columbia that Suburban attempts to alter its initial grounds for complaint by asserting this new argument at the rehearing stage of the proceeding. For this reason alone, rehearing should be denied.

Suburban Nat. Gas Co. v. Columbia Gas of Ohio ("Suburban"), Case No. 17-2168-GA-CSS, Second Entry on Rehearing at ¶ 23 (Oct. 23, 2019). Similarly, OCC's and OMAEG's new arguments advanced for the first time on rehearing should be denied "for this reason alone."

As a related matter, other assignments of error (OMAEG/Kroger Assignments of Error 2, 3, and 4) should be rejected because unsupported legal conclusions do not constitute error. *In re*

Application of Columbus Southern Power Co., 129 Ohio St.3d 271 (2011) at ¶¶ 14-17; *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284 (2009) at ¶ 39. Failure to develop or support arguments beyond conclusory statements constitutes a failure to adequately develop the argument. *Toliver v. Vectren Energy Delivery of Ohio*, 145 Ohio St.3d 346 (2015) at ¶ 30. In sum, these new arguments do little more than disagree with the Commission's decision and unfairly second-guess the decision, retroactively attempting to insert intervenor litigation positions developed as part of a subsequent audit proceeding.

OCC and OMAEG/Kroger's applications for rehearing should also be denied for additional reasons. The Commission did not err by refraining from scheduling a hearing when there is no such statutory requirement to hold one; especially, when no party requested a hearing during the comment period or at any time prior to issuance of the Opinion and Order. The Company's burden of proof was met in this matter where the Commission relied upon the detailed audit report performed by an experienced auditor as well as input from other interested parties through a comment and reply period. The Commission properly refrained from implementing carrying charges that were not initially approved as part of the PPA Rider.

Finally, the Commission did not err by refusing to apply inapposite legal tests and revisiting its PPA Rider decisions. OCC, throughout much of its application for rehearing, attempts to collaterally attack the PPA Rider, improperly second-guessing the rate impacts and suggesting that AEP Ohio should have engaged in a new competitive solicitation process that

was not contemplated by the Commission in its PPA Rider Orders. But the precedent on which OCC relies is not binding, off-target, and utterly irrelevant. Moreover, the fuel adjustment clause standard that OCC seeks to invoke is outdated and inapplicable and involves a concept completely distinct from the PPA Rider that serves as a hedging mechanism. OCC attempts to apply language from the PPA Rider Order that was not applicable to the years at issue in this audit and is no longer applicable given subsequent legislative events.

II. ARGUMENT

A. The Commission Should Reject OCC's First Assignment of Error and OMAEG/Kroger's First Assignment of Error Because They Failed to Request a Hearing in a Timely Fashion and Because They Have No Due Process Right to a Hearing. (OMAEG/Kroger Assignment of Error No. 1; OCC Assignment of Error No. 1)

OCC and OMAEG/Kroger both start off by asserting that the Commission erred because it failed to schedule a hearing in this proceeding. (*See* OCC AfR at 2-4; OMAEG/Kroger AfR at 2-4.) OCC notes that the Commission held an evidentiary hearing in Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR to review the PPA Rider charges for 2018 and 2019 and asserts that the Commission should have done the same here, or at least explained why it did not do so. (OCC AfR at 2-3.) OMAEG/Kroger, similarly, point to the hearing held on the 2018 and 2019 PPA Rider charges, and the hearing on Duke's OVEC rider, and assert that the Commission should have held a hearing in these cases. (OMAEG/Kroger AfR at 2-3.) OCC further suggests that the failure to hold a hearing "violated the parties' due process rights," citing the recent opinion in *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630. (OCC AfR at 3.) OMAEG/Kroger reference the same opinion. (OMAEG/Kroger AfR at 3 n.12.)

Yet in *In re FirstEnergy Advisors*, the appellants had timely *asked* the Commission to schedule an evidentiary hearing. *See In re Application of FirstEnergy Advisors*, Slip Opinion No. 2021-Ohio-3630, ¶ 8. In Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR, similarly, OCC and OMAEG filed a joint motion seeking an evidentiary hearing. *See In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case Nos. 18-1004-EL-RDR, *et al.*, Entry at ¶ 21, 24 (Oct. 5, 2021). Here, on the other hand, neither OCC, OMAEG, nor Kroger asked the Commission to schedule a hearing, either in their initial or reply comments or in a separate motion.

As noted above, parties to Commission hearings cannot raise new arguments on rehearing. *Suburban*, Second Entry on Rehearing at ¶ 23. "By failing to raise an objection until the filing of an application for rehearing," the Supreme Court of Ohio has held, a party "deprive[s] the commission of an opportunity to redress any injury or prejudice that may have occurred." *Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 1999-Ohio-141, 712 N.E.2d 724. *See also In re Buckeye Wind, L.L.C.*, 148 Ohio St.3d 69, 2016-Ohio-5664, 68 N.E.3d 786, ¶ 19 (holding that an appellant's "failure to take any action to challenge the scope of [a Power Siting Board] hearing until *after* the hearing had already occurred and *after* the board had issued its order" forfeited the party's "right to challenge the scope of the hearing on appeal" because it "deprived the board of an opportunity to cure any alleged error at a time when it reasonably could have done so"). The Commission recently rejected an OCC request for hearing as untimely when OCC's came in a motion filed only after it filed Reply Comments failing to contest Dominion's assertions that a hearing was unnecessary. *See In re Infrastructure Development Rider of The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 21-519-GA-IDR, Second Entry on Rehearing at ¶32 (Feb. 9, 2022) (relying on the annual IDR

report, Staff's audit, and all of the other filings made in the record). Certainly, if such a request was found to be untimely, waiting until application for rehearing is untimely. If OCC, OMAEG, and Kroger had wanted a hearing in this case, they were obligated to request one before the Commission issued its Finding and Order. Because they did not request one, they cannot be heard to complain about the lack of a hearing now.

Nor did the lack of a hearing deprive OCC, OMAEG, or Kroger of required due process. The Supreme Court of Ohio has repeatedly held that there is no constitutional right to hearing in rate-related matters if no statute provides a right to a hearing. *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 20 (citing *Office of Consumers' Counsel v. PUC of Ohio*, 70 Ohio St.3d 244, 248-249, 1994-Ohio-469, 638 N.E.2d 550; *Armco, Inc. v. Pub. Util. Com.*, 69 Ohio St.2d 401, 407, 433 N.E.2d 923 (1982); *Cleveland v. Pub. Util. Com.*, 67 Ohio St.2d 446, 453, 424 N.E.2d 561 (1981)); *see also In the Matter of the Application of Duke Energy Ohio, Inc. For an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR et. al, Opinion and Order at ¶ 36 (Apr. 20, 2022) (recognizing the Ohio Supreme Court precedent that "there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists"). In proceedings in which no statute requires a hearing, the Commission has "discretion [to determine] whether to allow * * * testimony." *In the Matter of the Joint Application of Sprint Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry on Rehearing ¶ 9 (Jan. 25, 2006). *See also In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶ 9 (Dec. 6, 2006) (rejecting OCC's contention that "any interested person [has] the right to intervene, conduct discovery, and present evidence in any Commission case" and explaining that adopting OCC's

position "would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate"). OCC, OMAEG, and Kroger have not identified any statute that requires a hearing in audit proceedings. The authority for the PPA Rider audit lies in the Commission's modification and approval of the stipulations in AEP Ohio's third electric security plan (Case No. 13-2385-EL-SSO) and AEP Ohio's request to populate the PPA Rider (Case No. 14-1693-EL-RDR). Neither the underlying ESP statute (R.C. 4928.143), or more importantly, the decisions approving the PPA Rider, require a hearing on the audit of the PPA Rider. Consequently, they had no due process right to a hearing.

OCC and OMAEG/Kroger's First Assignments of Error are untimely and unsupported by law and should be rejected.

B. The Commission Should Reject OMAEG/Kroger's Second Assignment of Error Because There was More Than Sufficient Information to Support the Commission's Conclusion that the PPA Rider Costs Were Prudent. (OMAEG/Kroger Assignment of Error No. 2)

Despite the Commission duly rejecting the arguments, in their Second Assignment of Error, OMAEG/Kroger regurgitates the same arguments that they raised in their Initial Comments, citing to pages 21 and 24 of the Audit Report, alleging that AEP Ohio failed to carry its burden of proof. (OMAEG/Kroger AfR at 4.) In their Application for Rehearing, however, OMAEG/Kroger embellish by claiming that the Auditor was unable to conduct a thorough analysis on *several* elements of the PPA Rider "throughout the Audit Report." (OMAEG/Kroger AfR at 4.) As the Commission accurately pointed out, however, OMAEG/Kroger identified only "two instances in which the Auditor indicated that AEP Ohio had not provided sufficient information on matters such as bidding strategy," neither of which undermine the Auditor's findings of prudence in this matter. Order at ¶ 53.

The first was related to how AEP Ohio determines bids for the annual PJM RPM capacity auctions. (Audit Report of the Power Purchase Agreement Rider of Ohio Power Company Completed by Vantage Energy Consulting ("Audit Report") at 21 (Jan. 11, 2019).) As AEP Ohio explained in its Comments, the Company answered every question posed by the Auditor (Order at ¶ 55), but more importantly, "there is no disagreement among the parties that the OVEC units cleared the capacity auctions for the period under review and that the resulting revenues were credited to ratepayers." Order at ¶ 57. Because all capacity resources that clear the auction are paid the same clearing price, there can be no doubt that the bidding strategy utilized for the Company's OVEC capacity resources was effective, successful, and prudent. Thus, despite OMAEG/Kroger's attempt to muddy the waters, there are no internal inconsistencies in the Audit Report as it relates to this issue. (Joint Comments of OMAEG/Kroger Comments at 3 (Jan. 17, 2020).) The Commission reasonably agreed with the Auditor's conclusion finding that AEP Ohio's capacity bidding strategy was prudent. Order at ¶ 57.

The second was related to the Auditor's statement that AEP Ohio "provided no evidence that any action has been taken to further study or address [ancillary services] opportunit[ies]." (Audit Report at 25.) Nevertheless, the Auditor once again found that AEP Ohio acted prudently because "the OVEC Operating Committee has begun to assess ancillary service opportunities," a decision involving "complexities of maximizing the benefits of energy and capacity markets to the potential opportunities of the ancillary services market, which may be mutually exclusive." (Audit Report at 25.) Moreover, in comments, AEP Ohio indicated to the Commission that OVEC had plans to conduct a study to determine the potential opportunities and operational risks associated with participating in this market. Given the analysis and reasoning provided by the

Auditor, as well as the representation by AEP Ohio, it was not unlawful or unreasonable for the Commission to adopt the Audit Report finding that AEP Ohio acted prudently and directing "AEP Ohio to file with the Commission, upon completion, a copy of OVEC's study of the potential opportunities and operational risks associated with participating in the ancillary services market." Order at ¶ 25.

Despite failing to raise the argument during the comment period, OMAEG/Kroger also attempt to improperly foist an attack on OVEC's designation as "must run" in the PJM *energy* market during the rehearing phase of this proceeding. (OMAEG/Kroger AfR at 4-5.) At no point, however, did OMAEG/Kroger raise any concerns about OVEC's involvement in the PJM energy market, let alone its operational designation. OMAEG/Kroger attempt to shoehorn the "must run" argument in with the second assignment of error and then assert that "the Commission summarily rejected these arguments in its Order." (OMAEG/Kroger AfR at 5.) This deceptively insinuates that the Commission summarily rejected the "must run" energy market designation along with the capacity and ancillary service market concepts that were raised in OMAEG/Kroger's Comments and Reply Comments. Consistent with prior precedent by this Commission as discussed above, it is improper for the Commission to now consider OMAEG/Kroger's "must run" argument because it was waived when OMAEG/Kroger failed to raise it during the comment period. *See Suburban*, Second Entry on Rehearing at ¶ 23. Moreover, the Auditor reached the conclusion that AEP Ohio prudently managed disposition of energy from the OVEC power plants after interviews with AEP Ohio representatives and a "detailed review" of meeting notes of the OVEC Operating Committee. (Audit Report at 12.)

Finally, without directly explaining or assigning such error as required by R.C. 4903.10,[1] OMAEG/Kroger insinuate that the Commission failed to meet its obligations under R.C. 4903.09 by not receiving evidence from experts. But the Commission relied upon the detailed 98-page audit report from an auditor with qualified expertise that was selected after the Commission conducted a public request for proposal process. The Audit Report was further supported by interviews of Company personnel and the Company's responses to 119 data requests accompanied by countless documents, all of which were also provided to OMAEG/Kroger. The Commission also opened the record up for comments and reply comments from any interested parties – of which OMAEG/Kroger availed themselves. There was no requirement to accept additional information from experts in this matter. And at no point did any party request an opportunity to provide additional expert testimony in this matter. The Commission has recently rejected prior attempts to use R.C. 4903.09 to inject uncertainty or request additional information or hearing through the application for rehearing process when no request was made during the comment period. *See In re Infrastructure Development Rider of The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 21-519-GA-IDR, Second Entry on Rehearing at ¶32 (Feb. 9, 2022) (relying on the annual IDR report, Staff's audit, and all of the other filings made in the record).

The Commission should reject OMAEG/Kroger's request for a finding of imprudence where the Auditor, who conducted a detailed evaluation, did not find imprudence.

[1] Applications for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." R.C. 4903.10(B).

C. OMAEG/Kroger's Assignment of Error No. 3 Merely Restates Their First and Second Assignments of Error and Should be Denied for the Same Reasons. (OMAEG/Kroger Assignment of Error No. 3)

OMAEG/Kroger Assignment of Error No. 3 argues that the Commission "unjustly, unreasonably, and unlawfully allow[ed] AEP [Ohio] to collect imprudently-incurred costs through the PPA Rider that were not in the best interests of customers." (OMAEG/Kroger AfR at 5.) This assignment of error, however, merely repeats OMAEG/Kroger's previous arguments and does not add any incremental grounds for rehearing. OMAEG/Kroger argue (id. at 6) that "AEP [Ohio] failed to meet [its] burden of proof by failing to provide sufficient evidence to Vantage," but this merely restates OMAEG/Kroger's Assignment of Error No. 2. For the reasons discussed above, *see supra* Section II.B., AEP Ohio satisfied its burden of proof, and OMAEG/Kroger has provided no basis to second-guess the Auditor's conclusion that AEP Ohio acted prudently. OMAEG/Kroger also argue (id. at 6) that "the Commission failed to properly hold an evidentiary hearing to determine if these costs were in fact just, reasonable, prudently incurred, and in the best interest of customers." But this merely restates OMAEG/Kroger's Assignment of Error No. 1. For the reasons discussed above, *see supra* Section II.A., OMAEG/Kroger failed to request a hearing and the audit and comment process provided the parties a full and fair opportunity to be heard.

D. The Commission Should Reject OMAEG/Kroger's Improper Fourth Assignment of Error and Refrain from Granting Carrying Charges that were Not Contemplated as Part of the Rider. (OMAEG/Kroger Assignment of Error No. 4)

OMAEG/Kroger, despite not having raised the issue in their initial comments (*see supra*), argue that the Commission erred by not assessing carrying charges on the over-recovery of the PPA Rider during the audit period. (OMAEG/Kroger AfR at 6-7.) Tellingly, even OCC (the only party that raised the issue in initial comments) chose not to pursue this issue on rehearing.

OMAEG/Kroger have provided no reasoning as to why the Commission's decision to deny carrying charges on over/under recoveries of the PPA Rider during the audit period was unlawful or unreasonable. This Commission has routinely denied applications for rehearing where parties have not raised new arguments (on issues properly preserved) for the Commission's consideration when they have been adequately addressed in prior rulings. *See e.g. In re Application of The East Ohio Gas Company dba Dominion Energy Ohio for Approval of an Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*, Case No. 19-468-GA-ALT, Second Entry on Rehearing at ¶ 29 (Feb. 23, 2022) (stating "[i]ntervenors have not raised any new arguments or perspective which persuades the Commission to reverse its position on this aspect of the Opinion and Order"); *In re Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Safely Resume Activities to Pre-COVID-19 Levels and Requests for Waivers*, Case No. 2-1345-EL-WVR, Entry on Rehearing at ¶ (Nov. 18, 2020) (holding "[t]he Commission thoroughly addressed OCC/OPLC's arguments in the September 23, 2020 Finding and Order . . . OCC/OPLC have raised no new arguments in support of this assignment of error. Accordingly, rehearing on this assignment of error should be denied"); *In re Application of Cincinnati Bell Telephone Company LLC for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 06-10002-TP-BLS, Entry on Rehearing at ¶ 7 (Jan. 31, 2007). Accordingly, the Commission should deny OMAEG/Kroger's fourth assignment of error because they have not offered any new argument, opting instead to simply request that "the commission grant rehearing and modify its April 20, 2022 Order," because "the Commission failed to adopt" the Auditor's recommendation regarding carrying charges. (*See* OMAEG/Kroger AfR at 6-7.)

Despite OMAEG/Kroger's improper assignment of error, the Commission correctly found that the PPA Rider was not designed with carrying charges for either under-recovery or over-recovery. Order at ¶59. It would be improper to now change the terms of the PPA Rider years after the mechanism was established and designed. It would be even more arbitrary and capricious to adopt the OMAEG/Kroger request to impose carrying charges on regulatory assets but not on regulatory liabilities, especially when AEP Ohio was not entitled to carrying charges on the $21 million deferral that was not collected for 18 months. Certainly, it was not unlawful or unreasonable to fail to adopt OMAEG/Kroger's self-serving assertion that was not contemplated as part of the ESP III or PPA Rider stipulations establishing the PPA Rider. This is further supported by the fact that the PPA Rider no longer exists and has been superseded by the LGR. Any carrying charges related to the PPA Rider audits would, as a practical matter, need to be charged through the Legacy Generation Resource ("LGR") Rider (and would have to be evaluated under the statute that created it). But, like the PPA rider, the statutorily enacted LGR Rider does not permit or provide for carrying charges either. *See* R.C. 4928.148; *see also* Order at ¶ 60. For these additional reasons, the Commission should deny OMAEG/Kroger's fourth assignment of error.

E. OCC's Argument that the Company Should Have Somehow Managed Around the Market Rate Impacts Associated with Implementing the PPA Rider Lacks any Basis, Conflicts with the *PPA Rider* Decision and Fails to Establish a Valid Basis for Rehearing – Especially Since OCC Failed to Raise this Argument in its Prior Comments and Pleadings During the Merit Stage of this Audit Proceeding. (OCC Assignment of Error No. 2)

OCC picks up its collateral attack by retrospectively second-guessing the original PPA Rider rate impact projections and claiming that the Company was somehow supposed to manage the financial hedge and "mitigate these above-market costs." (OCC AfR at 4-6.) OCC attempts to rely on a Michigan Public Service Commission ("MPSC") decision involving OVEC to

support its position that AEP Ohio "has a duty to continuously monitor market conditions and account for changing market conditions for its contracts." (*Id*. at 5.) OCC makes an unsupported claim that AEP Ohio "had a clear indication throughout 2016-2017 that the [PPA Rider] was not performing as expected" and, building on that false premise, concludes that the Company imprudently failed to take action to protect consumers. (*Id*. at 6.)

As an initial matter, OCC failed to make this argument during the merit stage of this case in its comments or prior pleadings. And there is no basis in the record of this proceeding to support its claim being advanced for the first time on rehearing. As discussed above, the parties may not alter their grounds for complaint on rehearing, and "for this reason alone," OCC's third assignment of error should be denied. *Suburban*, Second Entry on Rehearing ¶ 23. Moreover, a claim that the Company should have managed around the market rate impacts of the PPA Rider is without basis and conflicts with the *PPA Rider* decision.[2]

In advancing the flawed claim that AEP Ohio should have managed the OVEC financial hedge in a way that mitigated the rate impacts, OCC relies heavily on a recent decision by the MPSC involving OVEC that indicated: "while long-term contracts are encouraged, this does not absolve a utility from monitoring and responding to market conditions and system needs and making good faith efforts to manage existing contracts." *In the Matter of the Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending December 31, 2021*, Case No. U-20804 at 19 (Nov. 18, 2021) *("Michigan OVEC Order")*. (*See* OCC AfR at 5.) As a threshold matter, OCC's claim that

[2] OCC's passing citation (OCC AfR at 6) to R.C. 4905.22 does not help its cause. While an actual violation of that statute could form the basis for rehearing to challenge a rate order that adopted an unjust rate for the first time, the attack of the PPA Rider rate here on that basis constitutes an untimely (and improper) collateral attack on the *PPA Rider* decision – especially given that the prior rate order had already adopted the PPA Rider and the decision was subsequently upheld by the Supreme Court of Ohio as being lawful and reasonable (which rejected OCC's appeal to challenge that prior rate order). By contrast, this is an audit proceeding reviewing accounting and managerial actions of the Company in implementing the *PPA Rider* decision.

some action should have been taken rings hollow and is misguided because it fails to identify what appropriate action could have been taken under the ICPA to avoid net charges through the PPA Rider during the audit period. In light of the contract term extending through 2040, it is not like AEP Ohio could just terminate the contract. And in light of the fact that AEP Ohio had a minority stake in the output of the OVEC units, the Company cannot unilaterally winddown, shut down or retire the units. In any case, the *Michigan OVEC Order* is easily distinguished and otherwise inapplicable.

AEP Ohio does not use the output of OVEC units to serve load, so there is no need for replacement energy or alternative supply like there would be in Michigan. *Cf Michigan OVEC Order* at 16 (I&M uses the output of the ICPA to serve retail customers). Another key distinction for the MPSC decision is that decision was also based on Sierra Club's recommended application of the so-called inverse pricing rule, where the lower of cost or market applies to restrict cost recovery. *Michigan OVEC Order* at 5-6, 17, 22. The inverse pricing rule does not apply in Ohio and would run directly counter to the mechanics of the PPA Rider as approved in the *PPA Rider Order*. And the MPSC case was decided under a unique provision of Michigan law known as a "Section 7 warning" regarding the MPSC's prospective view of supply contracts, which was recommended by Sierra Club in that case. *Id*. at 3, 19-20. Another important distinction is that the AEP affiliate in Michigan has a portfolio of generation assets to manage in serving retail load – none of which applies to AEP Ohio – and the rationale cannot be extended outside of that context. *Id*. at 16.

Perhaps the most important distinction is that the MPSC had not prospectively approved the ICPA for inclusion in retail rates as a financial hedge like the Commission here approved the ICPA for inclusion in the PPA Rider as a financial hedge during the audit period knowing that

the contract term already extended through 2040. *Michigan OVEC Order* at 13, 17 (I&M did not present the ICPA for approval in the current case or in prior cases). The Commission in Ohio specifically approved the ICPA for inclusion in the PPA Rider and specifically held that the PPA Rider "will prevent customers' total reliance on the market," and intervenors' argument that it should equal market prices simply conflicts with that purpose. *In re 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 ("PPA Rider")*, Case No. 14-1693-EL-RDR, et al., Second Entry on Rehearing at ¶ 220 (Nov. 3, 2016). Hence, there is no basis for this Commission to rely on the MPSC decision and every reason to distinguish or ignore it in this audit proceeding.[3]

Apart from its misplaced reliance on the *MPSC OVEC Order*, OCC's underlying premise that something should have been done to avoid market price impacts is fundamentally flawed and conflicts with the Commission's *PPA Rider* decision. The PPA Rider operates as a financial hedge that is counter-cyclical to market prices – without regard to whether the OVEC costs are below market prices or above market prices at a given point in time. This intrinsic concept is rooted in the Commission's orders and is a function of the mechanics of the rider. It does not require or contemplate (or authorize) active management of the hedge by the Company.

[3] OCC also relied on the *FirstEnergy REC Case*, Case No. 11-5201-EL-RDR, Opinion and Order (Aug. 7, 2013) for the proposition that a utility has a duty to monitor changing market conditions and manage its regulatory commitments. (OCC AFR at 5.) The *FirstEnergy REC Case* is also easily distinguished. In that case, the utility had a statutory compliance obligation under R.C. 4928.64 to obtain RECs and it had free reign to do so based on its own management discretion, so reviewing its above-market purchases was fair game. Here, by contrast, AEP Ohio's contractual commitment to OVEC through 2040 was known when the Commission approved the ICPA for use as a financial hedge during the audit period; the Company did not have any unilateral ability or discretion to bypass the ICPA or replace it with another supply source during the audit period.

The Commission indicated that it was approving population of the PPA Rider "as a financial hedging mechanism" and made specific findings about how it would benefit customers:

> The PPA rider will supplement the benefits derived from the staggering and laddering of the SSO auctions and protect retail customers from price volatility in the market. The record reflects that the PPA rider will provide added rate stability during periods of extreme weather, when the rider can be expected to offset severe price spikes. The different scenarios reflected in AEP Ohio's projection of the PPA rider's impact demonstrate the effect of variation in load due to severe weather or economic factors, including the asymmetric impact that such factors have on electric prices, where increases in load tend to increase prices more so than load reductions decrease prices. If load increases due to weather or economic conditions, shopping and SSO customers will be exposed to the resulting higher wholesale prices, which the PPA rider will partially offset.

PPA Rider, Opinion and Order at p. 83 (Mar. 31, 2016). The Commission went on to reaffirm its prior finding in *ESP III* that the PPA Rider was "an essential component of AEP Ohio's ESP" adopted under R.C. 4928.143(B)(2)(d), the ESP statute, that "provides the benefit of a more balanced hedge than relying exclusively on the market." *Id*.

On rehearing in the *PPA Rider* case, the Commission made this point particularly clear when it observed that the rider's design ensures that the rider will act in a countercyclical manner to market prices and found that "[t]he PPA rider *mechanism* will *prevent* customers' total reliance on the market." *PPA Rider,* Second Entry on Rehearing at ¶¶ 216, 220 (emphasis added). By its structure, if market prices are up, the PPA Rider becomes a credit; when market prices are down, the rider becomes a charge. Either way, the rider acts to stabilize volatile market prices. And as the Commission found, the PPA Rider "prevents" customers from totally

relying on market prices – which is exactly what the revisionist intervenors now argue is required.

In sum, OCC's Assignment of Error No. 2 lacks a basis in the law or the record and should be rejected as failing to establish that the Commission's order is unlawful or unreasonable.

F. OCC's Reliance on Substantive Standards from the Long-Ago-Repealed Fuel Adjustment Clause ("FAC") Statute Misunderstands the Commission's Reference to the FAC, and the FAC Cases Relied Upon are Inapplicable. (OCC Assignment of Error No. 3)

OCC's Assignment of Error No. 3 argues that "the entire $60.9 million collected" under the PPA Rider in the Audit Period should be disallowed under standards that formerly applied under the repealed FAC statute. (OCC AfR at 7.) As an initial matter, OCC once again failed to make this argument in its original comments or reply comments. Its comments make no mention of the FAC or the standards that once applied in FAC audits. As discussed above, the parties may not alter their grounds for complaint on rehearing, and "for this reason alone," OCC's third assignment of error should be denied. *Suburban*, Second Entry on Rehearing ¶ 23.

In addition, OCC's argument misunderstands the Commission's reference to the FAC in the original *PPA Rider Order*. *PPA Rider*, Opinion and Order at 89 ("*PPA Rider Order*"). In the *PPA Rider Order*, the Commission stated that it "expects that the [audit] *process* will be carried out in a manner that is consistent with the *process* for AEP Ohio's prior fuel adjustment clause (FAC) mechanism." *Id.* (emphasis added). The *process* refers to the way the proceeding will be conducted – for example, that the proceeding will address a specific time, that there will be an independent audit, that parties will be afforded an opportunity to provide comments, etc. *Process* does not refer to the substantive scope of the proceeding or the substantive standards by which the prudence of costs will be evaluated.

The FAC statute, moreover, has long been repealed and is not the basis for the PPA Rider mechanism. The PPA Rider was approved under the ESP statute, R.C. 4928.143(B)(2)(d), "as a charge that acts as a financial limitation on customer shopping for retail electric-generation service, promotes stable retail electric-service prices, and ensures customer certainty regarding retail electric service," and this statutory basis was upheld against OCC's challenge on appeal to the Supreme Court. *In re Application of Ohio Power Co.*, 155 Ohio St. 3d 326, 2018-Ohio-4698, ¶ 26. The purpose and substantive standards of the outdated and repealed FAC are not applicable to the ESP statute.

To illustrate how out-of-date and inapplicable OCC's FAC precedent is, it is notable that the OCC's main authority for its fuel clause argument is an Akron Law Review article that OCC erroneously claims was published in 2015. (*See* OCC AFR at 8 n.23.) In fact, the article was published in **1979**. *See* Kevin F. Duffy, *Electric Fuel Adjustment Clause Review in Ohio*, 12 Akron L. Rev. 465 (1979). It goes without saying that a 43-year-old law review article about a long-ago-repealed statute has no bearing on this proceeding.

Even if FAC standards were applicable here (they are not), the principles and cases that OCC cites are inapposite. The law review article and cases that OCC cite all relate to the FAC issue of whether it was prudent for the utility to purchase energy *as opposed to generating energy itself*. (*See* OCC AFR at 7-8 ("Under a traditional Fuel Adjustment Clause analysis, the PUCO would only allow 'the purchasing utility to recover through the fuel adjustment clause the total energy charge for purchased power if that total charge is less than *the fuel cost of self-generation*.'" (emphasis added) (quoting Duffy, *supra*, at 478-479).) The choice between purchasing power and "the fuel cost of self-generation" obviously has no bearing here since AEP Ohio neither owns generation nor has fuel costs. OCC attempts to obscure this key distinction

by comparing the cost of the OVEC ICPA to "AEP's cost of obtaining power from PJM" (OCC AfR at 8), but that is not the same thing as "the cost of self-generation." Again, AEP Ohio has no "self-generation" capability, so OCC's case law is inapplicable.

Moreover, the authority that OCC cites does not control here because the PPA Rider is a financial hedging mechanism, not a mechanism for procuring least-cost power. The intentional purpose and design of the PPA Rider are to act *countercyclically* to market prices, meaning the rider reflects a credit when OVEC costs are lower than market prices, and it reflects a charge when OVEC costs are higher than market prices. In this way, the PPA Rider serves as "a financial hedging mechanism" that "supports stable retain rates" and "protects against volatile market prices." *PPA Rider Order* at 83. This countercyclical mechanism simply cannot be reconciled with the type of "least cost" rules that were formerly applied in the FAC context. OCC, of course, disagrees with the Commission's decision to adopt the PPA Rider as a financial hedging mechanism, but that decision has already been made and affirmed on appeal, and the time to challenge it has long since passed.

Indeed, the fact that the Commission has already approved the inclusion of the OVEC ICPA in the PPA Rider provides yet another reason why OCC's FAC authority misses the mark. This is not some new purchased power cost that AEP Ohio is attempting to recover for the first time in this proceeding. Rather, the inclusion of the OVEC ICPA in the PPA Rider was approved by the Commission in Case No. 14-1693-EL-SSO, and therefore OCC's FAC-based arguments constitute an improper collateral attack on that decision. OCC had every opportunity to oppose the inclusion of the OVEC ICPA in the PPA Rider, both at the Commission and at the Supreme Court. Again, the time for OCC to oppose the inclusion of ICPA in the PPA Rider has long since passed, and its arguments to that effect here are barred by collateral estoppel. *See In*

re Application of Ohio Power Co., 144 Ohio St. 3d 1, 11 (2015); *see also O'Nesti v. DeBartolo*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 7 (citing *Fort Frye Teachers Assn. v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998); *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10 (1985) (applying collateral estoppel to bar litigation of an issue in a second commission proceeding).

G. OCC's Desperate Attempt to Retroactively Modify the *PPA Rider* Decision's Credit Commitment Must be Rejected as Patently Unreasonable and Unlawful. (OCC Assignment of Error No. 4)

Finally, OCC alone argues that the original $15 million credit commitment for "the last four years of the rider" now means 2016-2019, since the PPA Rider ended up being replaced after 2019 instead of running through its original term of mid-2024 (due to legislative replacement of the PPA Rider with the Legacy Generation Rider). (OCC AfR at 9-10.) In addition to being an unreasonable and unlawful retroactive change to the Commission's *PPA Rider* decision, OCC's conclusion defies logic and fairness. As such, OCC's final assignment of error should also be rejected.

As an initial matter, OCC failed to make this argument during the merit stage of this case in its comments or prior pleadings. And there is no basis in the record of this proceeding to support its claim being advanced for the first time on rehearing. As discussed above, the parties may not alter their grounds for complaint on rehearing, and "for this reason alone," OCC's third assignment of error should be denied. *Suburban*, Second Entry on Rehearing ¶ 23. Moreover, OCC's claim that the credit commitment should be retroactively modified based on events that occurred after the *PPA Rider* decision is fundamentally flawed in multiple respects.

One false premise of OCC's position is that the PPA Rider Entry on Rehearing (which adopted the modified $15 million credit commitment) must, if at all possible, be construed against AEP Ohio – under the theory that the Second Entry on Rehearing is a "contract" drafted

by AEP Ohio. (OCC AFR at 9-10.) Of course, OCC's premise here is also flawed: AEP Ohio did not draft the Stipulation or the Commission's *PPA Rider* order – the Signatory Parties all drafted the settlement, and the Commission adopted the settlement in its own order.

In the initial order, the Commission found, based upon the record evidence presented in the case, that the OVEC-only PPA Rider was projected to produce a net credit to customers of approximately $110 million over its term – through the end of 2024. (*PPA Rider Order* at 38, fn.2.) As a synonym phrase for 2020-2024, the PPA Rider Order later referred to the credits to ratepayers as being "over the last four years of the PPA term." (*PPA Rider Order* at 84.) Of course, those references mean the exact same thing – the last four years of the PPA Rider at the time of the order were 2020-2024, and nothing that happens after the decision can change the original meaning and intent.

To avoid any doubt as to the credits applying only to specified time periods, the plain language of the PPA Rider Stipulation provision that created the credit commitment can be examined and it reads as follows:

> AEP Ohio agrees to provide an additional credit to customers, not to exceed the amount set forth in the table below:
> Planning Year 2020/2021 – $10M
> Planning Year 2021/2022 – $20M
> Planning Year 2022/2023 – $30M
> Planning Year 2023/2024 – $40M
> In no event will AEP Ohio provide an additional credit that result in customers receiving a net credit (the sum of the unadjusted PPA Rider credit and the additional credit) that exceeds the amount set forth in the table above.

(*PPA Rider Cases*, Stipulation (Jt. Ex. 1) at 5-6.) The voluntary credit commitment only applied to planning years 2020-2024 – all of which would have occurred after HB 6 *replaced* the PPA Rider mechanism effective as of January 2020 – and the settlement specified that "in no event" would an additional credit be applied beyond those listed in the table.

Fundamental due process and logic dictates that language from a Commission order cannot subsequently be reinterpreted to mean something different based on new facts and circumstances not known or in existence when the language was originally included in the original order. Ohio Const. Art. II, § 28 (retroactive laws are prohibited);*State v. Bruce*, 170 Ohio App.3d 92 (2007) (retroactive decision making is limited by due process). The PPA Rider was the lawful rate from 2016-2019 (*i.e.*, the first four years of the PPA Rider approved in 2016 for an eight-year term) and the LGR has become the lawful rate starting in 2020 to replace the last four years of the original PPA Rider term; and retroactive ratemaking is prohibited. *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915); *Keco v. Cincinnati & Southern Bell Tel. Co.*, 166 Ohio St. 281, 256-57, 141 N.E.2d 465 (1957). Because it was impossible for the Commission to foretell a future legislative enactment that would supersede the PPA Rider years after it was adopted, there is no way to reasonably conclude that the *PPA Rider* decision intended the strained interpretation presently advocated by the OCC. As a related matter, any attempt by the Commission to entertain OCC's revisionist-history attempt to modify the prior ESP decision after the ESP term ends would also violate AEP Ohio's statutory right to consent. *See In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 6-7 (2015).

OCC's desperate argument would also violate the terms of HB 6. R.C. 4928.148 was enacted and became effective in 2019 and provided that "any mechanism authorized by the public utilities commission prior to the effective date of this section for retail recovery of prudently incurred costs related to [OVEC] shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs through December 31, 2030." Consequently, the PPA Rider mechanism was repealed and replaced by the LGR Rider and all

aspects of the PPA Rider were superseded going forward as of January 1, 2020 – including the PPA Rider credits that might have otherwise been triggered starting in 2021.[4]

In conclusion, the Commission should not entertain OCC's misguided claim that the 2020-2024 credit commitment should be resurrected and modified, despite the Commission's original decision and despite the General Assembly's subsequent decision.

III. CONCLUSION

For the reasons set forth above, therefore, the Commission should deny OCC's Application for Rehearing in its entirety and OMAEG/Kroger's Application for Rehearing in its entirety.

Respectfully submitted,

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[4] Because the first potential credit was for the 2020-2021 PJM planning year, which would end after May 2021, any credit under the Stipulation would have accrued and been calculated as of June 2021 at the earliest – well after HB 6's repeal and replacement of the PPA Rider.

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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 was sent via email by, or on behalf of, the undersigned counsel to the following parties of record this 31st day of May 2022.

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