

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the OVEC Generation                     )  
Purchase Rider Audits Required by 4928.148            )  
for Duke Energy Ohio, Inc., the Dayton Power        )  
and Light Company, and AEP Ohio                     )

Case No. 21-477-EL-RDR

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**AEP OHIO’S MEMORANDUM CONTRA  
OCC’S REQUEST FOR AN INTERLOCUTORY APPEAL**

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Under Ohio Administrative Code (“OAC”) 4901-1-15(D), Ohio Power Company (“AEP Ohio”) submits this Memorandum Contra the April 12, 2023 “Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review” filed by the Ohio Consumers Counsel (“OCC”).

**I. Introduction & Summary**

This proceeding is the 2020 calendar year audit of AEP Ohio’s Legacy Generation Resource (“LGR”) Rider, which has been consolidated with 2020 reviews of similar riders of Duke Energy Ohio and Dayton Power and Light Company. As the Commission is aware, the LGR Rider is required by R.C. 4928.148. That statute, which became effective on October 22, 2019, mandates the establishment of a “nonbypassable rate mechanism” for any “legacy generation resource,” R.C. 4928.148(A), which includes AEP Ohio’s entitlement to the output of facilities owned by the Ohio Valley Electric Corporation (“OVEC”), *see* R.C. 4928.01(A)(41).

The purpose of this 2020 audit is to fulfill the Commission’s statutory directive to “determine . . . the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource, including their decisions related to offering the contractual commitment into the wholesale markets.” R.C. 4928.148(A)(1); *see also id.* (“The initial determination shall be made during 2021 regarding the prudence and

reasonableness of such actions during calendar year 2020.”). On July 14, 2021, the Commission selected London Economics International LLC (“LEI”) as a third-party auditor for this proceeding, and LEI conducted an audit for year 2020 and filed an audit report on December 17, 2021. On April 7, 2023, the Attorney Examiner issued an Entry establishing a schedule for comments on the auditor’s report. Entry 5 (Apr. 7, 2023), *In re OVEC Generation Purchase Rider Audits*, Case No. 21-477-EL-RDR (“April 7 Entry”).

OCC has now filed a request for an interlocutory appeal and an “application for review” challenging the April 7 Entry on the ground that the Entry did not “schedule an evidentiary hearing in this case.” (OCC Memo at 1.) OCC’s requests should be denied. As discussed below, OCC does not attempt to show that it is entitled to an automatic interlocutory appeal under OAC 4901-1-15(A), and it does not argue that the April 7 Entry presents a “new or novel question” under OAC 4901-1-15(B). Instead, OCC argues that the April 7 Entry constitutes a “departure from past precedent” under OAC 4901-1-15(B), but in fact, the exact opposite is true: The Commission regularly asks for comments (rather than testimony) on an auditor’s report, and Attorney Examiners issued nearly identical comment-scheduling entries in previous audits concerning AEP Ohio’s OVEC entitlement.<sup>1</sup> OCC did not seek interlocutory appeals of these previous comment-scheduling entries, and in fact no hearing was held in Case No. 18-1003-EL-RDR.

Contrary to OCC’s assertions about “due process,” moreover, the Supreme Court has clearly held that the Commission is not required to hold a hearing unless a hearing is mandated by statute. *Office of Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 70 Ohio St. 3d 244,

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<sup>1</sup> See, e.g., Entry (Dec. 13, 2019), *In re Review of Power Purchase Agreement Rider*, Case No. 18-1003-EL-RDR (setting comments schedule for 2016-2017 PPA Rider review; not addressing hearing); Entry (Dec. 7, 2020), *In re Review of Power Purchase Agreement Rider*, Case Nos. 18-1004-EL-RDR, 18-1759-EL-RDR (same for 2018-2019 PPA Rider reviews).

248 (1994). And here, the statute establishes procedures for audit cases and does *not* mandate a hearing. *See* R.C. 4928.148(A)(1).

OCC also has failed to establish that the comment process is inadequate for it to raise its claims. This case is about “the actions of electric distribution utilities” during the 2020 audit year, R.C. 4928.148(A)(1), but OCC’s motion identifies no such “actions” it is challenging. Instead, OCC continues to rehash its old grievances about the *existence* of the LGR Rider, but that argument is foreclosed by statute and is not relevant to this audit. *See* R.C. 4928.148(A). The comment process is entirely adequate for audit cases in the ordinary course, and that is doubly true where, as here, OCC’s only arguments are irrelevant to the proceedings.

Lastly, OCC has failed to show “the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.” OAC 4901-1-15(B). If the Commission ultimately determines that a hearing is necessary in this case, it will order one in due course, and OCC will be no worse off. An immediate interlocutory appeal is not necessary for this to happen, and OCC will suffer no irreparable harm by denying the appeal.

## **II. Standard of Review**

Interlocutory appeals of Attorney Examiner orders are governed by OAC 4901-1-15. Under Section (A) of OAC 4901-1-15, a party is entitled to an automatic interlocutory appeal of certain types of Attorney Examiner orders, none of which are at issue here. Instead, OCC expressly relies (OCC Memo at 2) on Section (B) of OAC 4901-1-15, which allows parties to ask the Attorney Examiner to “certify” an interlocutory appeal. Section (B) provides in full:

Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal

director, deputy legal director, attorney examiner, or presiding hearing officer. *The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.*

OAC 4901-1-15(B) (emphasis added).

OCC also styles its Motion as an “Application for Review.” OCC cites no standard for an “Application for Review” of an Attorney Examiner’s scheduling entry.

### **III. Discussion**

#### **A. OCC Concedes That Is Not Entitled to an Automatic Interlocutory Appeal.**

Although OCC styles its Motion as both an “Interlocutory Appeal” and a “Request for Certification,” OCC makes no effort to show that it is entitled to an automatic interlocutory appeal under Section (A) of OAC 4901-1-15. (See OCC Memo at 2-4). Instead, OCC relies entirely on the discretionary certification standard under Section (B) of OAC 4901-1-15. (See *id.*) Therefore, OCC has conceded that it is not entitled to an automatic interlocutory appeal. This is confirmed by the fact that none of the enumerated grounds for an interlocutory appeal in Section (A) are present here.

#### **B. The Attorney Examiner Should Deny OCC’s Request to Certify an Interlocutory Appeal.**

The Attorney Examiner should deny OCC’s request to certify an interlocutory appeal because it satisfies none of the requirements of the applicable standard. As noted above, the Attorney Examiner “shall not certify” an interlocutory appeal “unless he or she finds” either (1) that the appeal “presents a new or novel question of interpretation, law, or policy,” or (2) that the appeal “is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue

prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.” OAC 4901-1-15(B).

OCC does not rely on the “new or novel question” prong of OAC 4901-1-15(B). Instead, OCC relies entirely on the second prong, claiming that the ruling was a “departure from past precedent.” (*See* OCC Memo at 2.) As described below, OCC has not met that standard.

**1. The April 7 Entry Was in No Way a “Departure from Past Precedent.”**

OCC’s requested appeal does not satisfy the “departure from past precedent” prong of OAC 4901-1-15(B) because the April 7 Entry is completely consistent with “past precedent.” The April 7 Entry merely established a schedule for comments. Contrary to OCC’s hysteria, the April 7 Entry did not actually address the question of whether there will be a hearing in this case. It is common for the Commission to ask for comments in a rider audit case to determine the scope of the contested issues, and the Attorney Examiners issued virtually identical comment-scheduling entries in past audits concerning AEP Ohio’s OVEC entitlement. *See, e.g.*, Entry (Dec. 13, 2019), *In re Review of Power Purchase Agreement Rider*, Case No. 18-1003-EL-RDR (setting comments schedule for 2016-2017 PPA Rider review; not addressing hearing); Entry (Dec. 7, 2020), *In re Review of Power Purchase Agreement Rider*, Case Nos. 18-1004-EL-RDR, 18-1759-EL-RDR (same for 2018-2019 PPA Rider reviews). The April 7 Entry did not “depart” from this established practice in any way.

Moreover, even if the April 7 Entry had precluded a hearing (which it did not), it is fully permissible for the Commission to reach a decision in a rider audit such as this based on the auditor’s report and the parties’ comments, without a full hearing. The Supreme Court has “repeatedly held that the right to participate in a ratemaking proceeding is statutory, not constitutional, and that absent express statutory provision, a ratepayer has no right to notice and

hearing under the Due Process Clauses of the Ohio and United States Constitutions.” *Office of Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 70 Ohio St. 3d 244, 248 (1994) (expressly approving an “objection and comment procedure” as a “valid basis for resolving the factual issues raised by OCC” and denying OCC’s argument that the Commission was required to hold a hearing where one was not required by statute). Here, R.C. 4928.143 expressly establishes a procedure for audit cases, and the statute does not require a hearing. Therefore, the Commission may reach a decision in this proceeding based on the audit report and comments alone.

OCC cites cases (Memo at 3-4) in which the Commission elected to hold a hearing for an audit proceeding, but these cases only stand for the unremarkable proposition that the Commission *may* schedule a hearing in an audit case if it wants to. As noted above, the Commission is not *required* to schedule a hearing unless mandated by statute, and OCC cites no cases suggesting otherwise. Indeed, the Commission has previously decided audit cases involving the OVEC entitlement without a hearing. For instance, the Commission issued a decision in the 2016-2017 PPA Rider audit based on the audit report and comments, without a hearing. *See* Finding & Order (Apr. 20, 2022), *In re Review of the Power Purchase Agreement Rider*, Case No. 18-1003-EL-RDR.

The comment process, moreover, gives OCC ample opportunity to raise issues and make arguments, and OCC offers no reason to conclude that the comment process is inadequate. It is notable that OCC’s only apparent criticisms of the 2020 LGR Rider are OCC’s now-tired challenges to the *existence* of the LGR Rider. (*See* OCC Motion at 1 (labeling the LGR Rider as “anti-competitive corporate welfare” but raising no specifics about AEP Ohio’s “actions” during the 2020 audit year).) OCC’s arguments about the *existence* of the LGR Rider are irrelevant to this audit case and do not merit a hearing. The statute, R.C. 4928.148, expressly limits the issues

in this audit case to the “the actions of electric distribution utilities with ownership interests in the legacy generation resource” in calendar year 2020. R.C. 4928.148(A)(1). If OCC wants to continue its quixotic attacks on the very existence of the LGR Rider, this case is not the appropriate forum. And if OCC insists on pressing its now-threadbare hyperbole while ignoring the statutory standard, it can do so in comments. As noted above, due process does not require a hearing at all in this case, and it certainly does not require one so that OCC can submit evidence on irrelevant arguments that are straightforwardly foreclosed by statute.

**2. There Is No Threat of Irreparable Harm Meriting an Immediate Interlocutory Appeal.**

Not only does OCC fail to show that the April 7 Entry is a “departure from past precedent,” but it also fails to establish that it will suffer prejudice without an interlocutory appeal. Under OAC 4901-1-15(B), an Attorney Examiner “shall not certify such an appeal unless he or she finds that the appeal . . . is taken from a ruling which represents a departure from past precedent *and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.*” OAC 4901-1-15(B) (emphasis added). Here, if the Commission “ultimately reverses the ruling in question” in its eventual Finding and Order, OCC will suffer no prejudice. That is, under the schedule in the April 7 Entry, the parties will submit comments as they have done in numerous other audit cases. If the Commission then issues a Finding and Order and determines that a hearing is necessary, the parties will have an opportunity to submit testimony, and a hearing will go forward. In that scenario, there will be no prejudice to OCC, because it will get what it wants—a hearing.

Without such prejudice, OCC has not established the need for an immediate interlocutory appeal. This is not a situation where a party will suffer immediate, irreparable harm unless the

Commission intervenes through an interlocutory appeal. Instead, the Commission can address OCC's arguments about the need for a hearing in due course, without an interlocutory appeal, and OCC will suffer no prejudice. That alone is sufficient ground to deny OCC's request for certification.

**C. OCC's Requests for "Clarification" and "Review" Should Be Denied.**

For all the reasons discussed above, the Attorney Examiner should also deny OCC's "request for clarification" and its "application for review." To the extent these requests restate OCC's arguments for an interlocutory appeal, they are meritless, as discussed above. To the extent OCC's raises new arguments, each one is unavailing:

First, OCC makes vague claims about rights to discovery, but the April 7 Entry did not address discovery at all, and it is difficult to understand precisely what OCC is asking the Attorney Examiner to "clarify" or "review" concerning discovery. There are pending discovery disputes in this case, and AEP Ohio will not repeat its submissions concerning those disputes.

Second, OCC alludes to the requirement in R.C. 4903.09 to make "findings of fact and written opinions," but the April 7 Entry was merely a scheduling order and did not decide any merit issues. OCC's challenge, therefore, is premature. The Commission will eventually issue a Finding and Order in this proceeding that will be subject to R.C. 4903.09. For the same reasons, OCC's heavy reliance on *In re Application of FirstEnergy Advisors for Certification as Competitive Retail Elec Serv. Power Broker & Aggregator*, 166 Ohio St. 3d 519, 2021-Ohio-3630, is misplaced. In that proceeding, the Commission issued a Finding and Order that adopted a Staff Report concerning a CRES certification, and the Court held that the Staff Report was insufficient to satisfy R.C. 4903.09. Again, the Commission has not yet issued any Finding and



Order on the merits, and the detailed Audit Report in this case, which makes numerous independent factual findings, is distinguishable from the Staff report in *FirstEnergy Advisors*.

Third, OCC's citation to the Auditor's Request for Proposals is puzzling and meritless. The RFP is not, of course, a binding scheduling order, and it was entirely prudent for the RFP to contemplate the possibility that the Auditor will need to testify *if* a hearing is scheduled. That was not a commitment or promise that a hearing *will* be scheduled.

#### **IV. Conclusion**

For the foregoing reasons, OCC's April 12, 2023 "Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review" should be denied.

Respectfully submitted,

/s/ Steven T. Nourse

Steven T. Nourse 0046705)  
Michael J. Schuler (0082390)  
American Electric Power Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
Telephone: (614) 716-1608 (Nourse)  
Telephone: (614) 716-2928 (Schuler)  
Facsimile: (614) 716-2950  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjschuler@aep.com](mailto:mjschuler@aep.com)

**Counsel for AEP Ohio**

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