

In the Matter of the OVEC Generation )  
Purchase Rider Audits Required by R.C. )  
4928.148 for Duke Energy Ohio, Inc., the ) Case No. 21-477-EL-RDR  
Dayton Power and Light Company, and )  
AEP Ohio. )

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October 26, 2023

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential consumers of Duke Energy Ohio ("Duke"), The Dayton Power and Light Company ("DP&L"), and AEP Ohio ("AEP") (collectively, the "Utilities"), the Ohio Manufacturers' Association Energy Group ("OMAEG"), on behalf of Ohio manufacturers, and The Kroger Co. ("Kroger") (collectively, the "Joint Movants") jointly ask the Public Utilities Commission of Ohio ("PUCO") to take administrative notice of the Evidentiary Hearing Testimony, including cross-examination, and Exhibits of Marie Fagan of record in Case No. 18-1004-EL-RDR ("Evidentiary Materials"). Joint Movants move to incorporate such Evidentiary Materials from Case No. 18-1004-EL-RDR as part of the evidentiary record in this case. The Evidentiary Materials include the following:

1. Hearing Transcript Volume I, Marie Fagan Direct and Cross-Examination (Jan. 26, 2022).
2. Hearing Transcript Volume II, Marie Fagan Cross-Examination (Jan. 27, 2022).
3. Hearing Transcript Volume III, Admission of Exhibits, pages 648-709 (Jan. 28, 2022).

4. PUCO Staff Exhibit 1, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company, Public Version (Sept. 16, 2020).
5. PUCO Staff Exhibit 1A, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company, Confidential Version. - Filed under seal (Sept. 16, 2020).
6. PUCO Staff Exhibit 2, Prepared Testimony of Marie Fagan (Dec. 29, 2021).
7. AEP Exhibit 22, EIA Report Capital Cost and Performance Characteristic Estimates for Utility Scale Electric Power Generating Technologies, February, 2020 (Jan. 27, 2022).
8. AEP Exhibit 29, Excerpt of OCC-RPD-01-004 Supplemental Attachment 2 (Jan. 27, 2022).
9. OCC Exhibit 2, PUCO Staff's Notice of filing Errata Sheet for Audit Report (Dec. 29, 2021).
10. NRDC Exhibit 2, Emails between PUCO and OVEC Auditor (Jan. 27, 2022).
11. OMAEG Exhibit 6, EIA Report Ohio State Energy Profile and Electricity State Profile (Jan. 27, 2022).

Good cause exists to grant this Motion. The Evidentiary Materials are admissible under the Ohio Rules of Evidence and PUCO precedent and are highly relevant to this proceeding. The Evidentiary Materials are official records of the PUCO not subject to reasonable dispute. Moreover, administrative notice of the Evidentiary Materials would not prejudice the Utilities as they will have advance notice of the Evidentiary Materials prior to the upcoming evidentiary hearing in the current case and an opportunity to respond.<sup>1</sup>

The Evidentiary Materials sought to be noticed and the reasons for this Motion are more fully explained in the attached Memorandum in Support.

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<sup>1</sup> *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184 (1988), 532 N.E.2d 1307, 1988 Ohio LEXIS 439.

Respectfully submitted,

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## **TABLE OF CONTENTS**

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. DISCUSSION .....	4
A. The Evidentiary Materials, including sworn testimony, cross-examination of the auditor and exhibits, are admissible and can be used for impeachment purposes.....	4
1. The Evidentiary Materials are admissible because they contain relevant evidence and are not hearsay. ....	4
2. The Evidentiary Materials, including sworn testimony, cross- examination and exhibits, can be used for impeachment purposes. ....	6
B. It would be just and reasonable for the PUCO to take administrative notice of the Evidentiary Materials.....	7
III. CONCLUSION.....	9

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## I. INTRODUCTION

The PUCO originally hired London Economics International LLC (“London Economics”) to audit AEP’s 2018-2019 Coal Plant Subsidy costs,<sup>4</sup> and the PUCO also

<sup>4</sup> See, e.g., *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 4 (January 15, 2020).

hired London Economics to audit the Utilities' Coal Plant Subsidy costs in the present case.

In the 2018-2019 AEP case (as in the present case), London Economics was required to determine whether the Coal Plant Subsidy costs were “in the best interests of retail ratepayers.”<sup>5</sup> The Evidentiary Materials show that London Economics submitted a draft audit report stating that “keeping the plants running does not seem to be in the best interests of the ratepayers.”<sup>6</sup> PUCO Staff, however, directed the London Economics auditor to use a “milder tone and intensity of language.”<sup>7</sup> In response to PUCO Staff's instructions, London Economics removed this statement from the final version of the audit report.<sup>8</sup>

The audits in the present case involve the same coal plants, the same auditing firm (London Economics), the same PUCO Staff members and the same London Economics auditor (Marie Fagan). Joint Movants move that the PUCO take administrative notice of the Evidentiary Hearing Testimony, including cross-examination, and Exhibits of Marie Fagan of record in Case No. 18-1004-EL-RDR (“Evidentiary Materials”). The Evidentiary Materials include the following:

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<sup>5</sup> *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR, et al., Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 4 (January 15, 2020); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, et al., Entry, Attachment: Request for Proposal No. RA20-PPA-3: An Independent Audit of the Reconciliation Rider of Duke Energy Ohio at 4 (February 13, 2020).

<sup>6</sup> AEP Audit, Hearing Transcript Vol. III, p. 426:14 – 428:3.

<sup>7</sup> AEP Audit, NRDC Ex. 2.

<sup>8</sup> *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Hearing Transcript Vol. I, p. 177.



1. Hearing Transcript Volume I, Marie Fagan Direct and Cross-Examination (Jan. 26, 2022).
2. Hearing Transcript Volume II, Marie Fagan Cross-Examination (Jan. 27, 2022).
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11. OMAEG Exhibit 6, EIA Report Ohio State Energy Profile and Electricity State Profile (Jan. 27, 2022).

These Evidentiary Materials are admissible in the present case for several reasons, as discussed in more detail below.

## II. DISCUSSION

**A. The Evidentiary Materials, including sworn testimony, cross-examination of the auditor and exhibits, are admissible and can be used for impeachment purposes.**

**1. The Evidentiary Materials are admissible because they contain relevant evidence and are not hearsay.**

Relevant evidence is generally admissible.<sup>9</sup> “Relevant” evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>10</sup>

The Evidentiary Materials show that Ms. Fagan submitted a draft audit report stating that, “keeping the plants running does not seem to be in the best interests of the ratepayers.”<sup>11</sup> This evidence is relevant to show her initial opinion about the coal plants. At issue in the 2018-2019 AEP case and in the present case is Ms. Fagan’s opinion regarding the coal plants. Knowing that she submitted a draft report stating that, “keeping the plants running does not seem to be in the best interests of the ratepayers”<sup>12</sup> makes it more probable that this is her accurate opinion.

The Evidentiary Materials also show that when Ms. Fagan submitted her draft audit report, the PUCO Staff instructed her to use a “milder tone and intensity of language”<sup>13</sup> This evidence is relevant to show that keeping the plants running is imprudent and not in the best interest of consumers.

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<sup>9</sup> Ohio R.Evid. 402.

<sup>10</sup> Ohio R.Evid. 401.

<sup>11</sup> Hearing Transcript Vol. III, p. 426:14 – 428:3.

<sup>12</sup> *Id.*

<sup>13</sup> NRDC Ex. 2.

The evidence is also relevant to show any potential bias or prejudice that may exist in this case between the auditor, the utilities, and/or Staff. The Evidentiary Materials are relevant to prove that the audit report was not “independent” as required by the PUCO’s Entry hiring London Economics as the auditor.<sup>14</sup> Knowing that Ms. Fagan said in her draft report that “keeping the plants running does not seem to be in the best interests of the ratepayers”<sup>15</sup> and that she eliminated this statement at the PUCO Staff’s request makes it more probable than it would be without this evidence to show that Ms. Fagan did not act independently because she removed the statement from her final report at the PUCO Staff’s request. It also should be concerning to the PUCO that it appears that it is the independent auditor’s practice to allow the regulated entities being audited and others to provide comments or suggested edits on matters other than factual errors. Indeed, this concerned the penultimate conclusions in her draft audit reports and the outside comments led to revisions of the scope of the audits before consumers and other intervenors had an opportunity to review or provide input on the auditor’s findings. Rather, it is the law and the PUCO who should establish the scope of the audit and preserve the independent nature of the audit.

Relevant evidence can be excluded if it causes confusion of the issues, but only if the probative value is substantially outweighed by the danger of confusion.<sup>16</sup> This case will be decided by PUCO Commissioners who are experts in utility regulation and who have decided many cases relating to OVEC over the years. It cannot reasonably be

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<sup>14</sup> Entry at ¶ 10 (July 14, 2021).

<sup>15</sup> Hearing Transcript Vol. III, p. 426:14 – 428:3.

<sup>16</sup> Ohio R.Evid. 403.

argued that there is any danger of confusion which would substantially outweigh the probative value of the evidence.

Additionally, this evidence is admissible as an admission by party-opponent.<sup>17</sup> Per Ohio R.Evid. 801(D)(2), when a statement is offered against a party and is the party's own statement, in either an individual or a representative capacity, then such a statement is not hearsay. The statements made by Ms. Fagan during the AEP audit hearing regarding her actions with the draft audit report were her own and are therefore admissible in this case since they do not constitute hearsay.

**2. The Evidentiary Materials, including sworn testimony, cross-examination and exhibits, can be used for impeachment purposes.**

The Evidentiary Materials can also be used for impeachment purposes, to show that Ms. Fagan is biased and prejudiced in favor of the Utilities and that she lacks independence.<sup>18</sup> Ohio R.Evid. 611(B) states that "cross-examination shall be permitted on all relevant matters and matters affecting credibility." Ohio R.Evid. 616(A) provides that a witness can be impeached with evidence of bias, prejudice, or motive to misrepresent. The Evidentiary Materials can be used for impeachment purposes to establish Ms. Fagan's bias and prejudice and lack of independence.<sup>19</sup>

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<sup>17</sup> Ohio R.Evid. 801(D)(2).

<sup>18</sup> *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 2001-Ohio-248, 743 N.E.2d 890.

<sup>19</sup> *Id.*

**B. It would be just and reasonable for the PUCO to take administrative notice of the Evidentiary Materials.**

The PUCO has broad discretion to conduct its own hearings.<sup>20</sup> The PUCO is not strictly confined to the rules of evidence,<sup>21</sup> but is required to generally observe the rules of procedure and rules of evidence used in civil proceedings.<sup>22</sup>

Under Ohio R.Evid. 201, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to receive relevant evidence from prior cases. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Under subsection (F) of Rule 201, “Judicial notice may be taken at any stage of the proceeding.”

The Supreme Court of Ohio has held that while there is no absolute right for the taking of administrative notice, there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.<sup>23</sup> The important factors for applying administrative notice, according to the Court, are that the complaining party has prior knowledge of and an opportunity to rebut the materials judicially noticed.<sup>24</sup> The appropriate scope of notice is broader in administrative proceedings than in trials.<sup>25</sup>

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<sup>20</sup> See, e.g., R.C. 4903.02, 4903.03, 4903.04; O.A.C. 4901-1-27.

<sup>21</sup> See *Greater Cleveland Welfare Rights v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62, 442 N.E.2d 1288, 1982 Ohio LEXIS 760.

<sup>22</sup> R.C. 4903.22.

<sup>23</sup> See *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18, 647 N.E.2d 136, 1995 Ohio LEXIS 831 (citing to *Allen, D.B.A. J & M Trucking, et al., v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185, 532 N.E.2d 1307, 1988 Ohio LEXIS 439).

<sup>24</sup> See, e.g., *Allen*, 40 Ohio St.3d at 186.

<sup>25</sup> See *Banks v. Schweiker*, 654 F.2d 637, 641, (9th Cir. 1981), 654 F.2d 637, 1981 U.S. App. LEXIS 18197.

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,<sup>26</sup> cases,<sup>27</sup> entries,<sup>28</sup> expert opinion testimony, and briefs and other pleadings filed in separate proceedings.<sup>29</sup> The PUCO has also taken administrative notice of the entire record<sup>30</sup> and evidence presented in separate cases.<sup>31</sup>

In this case, Joint Movants ask the PUCO to take administrative notice of the Evidentiary Materials. Taking administrative notice of the Evidentiary Materials would not prejudice the Utilities because, through this Motion, they receive advance notice of movants' request for administrative notice, and they have time to rebut this evidence at the evidentiary hearing.

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<sup>26</sup> *In the Matter of the Review of the Interim Emergency and Temporary PIPP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry at ¶ 6 (February 22, 1989) (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code).

<sup>27</sup> *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-GA-ORD, Entry on Rehearing at 33 (May 16, 2006) (administrative notice taken of case filed where utility presented problems with remote technology and sought to discontinue new installation of remote meters).

<sup>28</sup> *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order at 110 (August 19, 1990) (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket).

<sup>29</sup> *See In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 18-21 (July 18, 2012) (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry at ¶ 6, (April 6, 2010), *aff'd* by Entry on Rehearing at ¶ 14 (May 13, 2010) (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings "may be used for any appropriate purposes").

<sup>30</sup> Case No. 10-388-EL-SSO, Entry at ¶ 6 (April 6, 2010), *aff'd* by Entry on Rehearing at ¶ 14 (May 13, 2010).

<sup>31</sup> *Id.*; *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Rates in Its Service Area*, Case No. 91-410-EL-AIR, Opinion and Order at 19 (May 12, 1992) (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case).

### III. CONCLUSION

Joint Movants respectfully request that the PUCO grant this Motion for the reasons stated herein. Joint Movants respectfully request that such Evidentiary Materials from Case No. 18-1004-EL-RDR be incorporated as part of the evidentiary record in this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Joint Motion to Take Administrative Notice has been served electronically upon those persons listed below this 26<sup>th</sup> day of October 2023.

*/s/ John Finnigan*

John Finnigan (0018689)

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Joint Motion to Take Administrative Notice by Office of The Ohio Consumers' Counsel, The Ohio Manufacturers' Association Energy Group and The Kroger Co. electronically filed by Mrs. Tracy J. Greene on behalf of Finnigan, John.