

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**DUKE ENERGY OHIO, INC., AES OHIO, AND OHIO POWER COMPANY’S  
MOTION TO STRIKE SPECIFIC INTERVENOR PRE-FILED DIRECT TESTIMONY**

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Pursuant to Ohio Adm.Code 4901-1-12 and Ohio Adm.Code 4901-1-27(B)(4) and (B)(7)(b) and (d), Duke Energy Ohio, Inc. (Duke Energy Ohio), AES Ohio (d/b/a/ Dayton Power and Light Co.), and the Ohio Power Company (AEP Ohio) (collectively, the EDUs) respectfully move for an order striking certain Direct Testimony of Joseph S. Perez (Perez or OCC witness Perez) on behalf of the Office of the Ohio Consumers’ Counsel (OCC). As outlined below, certain testimony from OCC witness Perez constitutes improper hearsay, lacks first-hand knowledge, and is irrelevant and highly prejudicial. Indeed, in the audit of the Duke Energy Ohio’s 2019 OVEC costs, the Commission affirmed a ruling by Attorney Examiners that struck testimony that is very similar to the testimony that the EDUs seek to strike here. For all of these reasons, and those identified below, portions of Mr. Perez’s testimony must be stricken from the record. A memorandum in support follows.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### **I. INTRODUCTION**

According to the Public Utilities Commission of Ohio’s (Commission) procedural rules, Attorney Examiners are empowered with the authority to “[r]ule on objections, procedural motions, and other procedural matters” as well as the ability to “[t]ake such actions as are necessary to . . . [p]revent the presentation of irrelevant or cumulative evidence.”<sup>1</sup> In light of the Commission’s unique ability to manage its docket and the actions before it, the EDUs ask that the Attorney Examiners charged with evaluating the underlying matter exercise their authority as it relates to the pre-filed testimony of OCC in this matter. Particularly, the EDUs seek to strike particular testimony from OCC witness Perez, filed October 10, 2023, as detailed in the chart below:

<b>Witness</b>	<b>Testimony Citation</b>	<b>Text to be Struck or Modified &amp; Description</b>	<b>Reasoning</b>
OCC Witness Perez	Attachment JSP-3	Emails between PUCO Staff, Auditor, AEP Ohio in the 2019 AEP Audit.	Inadmissible hearsay offered for the truth of the matter asserted; irrelevant and prejudicial in the underlying matter.
OCC Witness Perez	2:24-2:25, 3:8-3:9	All reference to emails from the 2019 AEP Ohio PPA Audit.	Inadmissible hearsay offered for the truth of the matter asserted; irrelevant and prejudicial in the underlying matter as it is outside of the relevant Audit period.
OCC Witness Perez	5:9-5:23, 16:1-17:4	All of 5:9-5:23 and Q&A 19 which attaches, opines upon, and describes hearsay from JSP-3.	This Q&A recounts hearsay testimony from the email communications mentioned in JSP-3. It also conflates the draft and final audit reports in the underlying case and the AEP Audit, and even leads the Commission to believe that the draft report in the underlying matter formerly contained language that it clearly did not.

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<sup>1</sup> Ohio Administrative Code (OAC) 4901-1-27(B)(4) and (7)(b).

A review of Mr. Perez’ testimony reveals that OCC intends to offer testimony and exhibits that relate to irrelevant matters outside the scope of this proceeding. Moreover, Mr. Perez relies on, and attaches to his testimony, improper hearsay material as an exhibit, and lacks personal knowledge to testify to or present evidence on any of the matters upon which he testifies as it relates to these communications. Such testimony and such exhibit are outside the scope of the LGR Audit, irrelevant, highly prejudicial, and hearsay not subject to any exception.

Indeed, the Commission has affirmed rulings by the Attorney Examiner that struck this specific exhibit and similar testimony, for the same reasons as those identified here, in Duke Energy Ohio’s Rider PSR proceeding, *In the Matter of the Review of the Price Stabilization Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR (PSR Audit).<sup>2</sup> That Commission decision mandates that Mr. Perez’s testimony be struck in this case.

## **II. LAW AND ARGUMENT**

### **A. OCC Witness Perez Has No Personal Knowledge Regarding the Intentions of Staff or the Auditor in the 2019 PPA Audit Proceeding and Should not be Permitted to Testify Regarding the Same.**

OCC witness Perez has no personal knowledge of email communications he testifies about, which email communications took place during the course of the PPA Rider Audit in Case No. 18-1004-EL-RDR (PPA Audit)—a wholly separate and distinct prior proceeding involve a different set of parties and a different rider. All testimony from Mr. Perez regarding these emails, and the conclusions he draws regarding the same, must be stricken.<sup>3</sup>

Generally, Witness Perez discusses an email (that does not pertain to this proceeding) from a PUCO Staff member (who was not assigned to work on this proceeding) to the Auditor (Dr. Marie Fagan). OCC witness Perez is not employed by Commission Staff. He is not the Auditor.

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<sup>2</sup> PSR Audit Opinion and Order at 7-9 (September 6, 2023).

<sup>3</sup> See Perez Direct Testimony at 2:24-2:25, 3:8-3:9, 5:9-5:23, and 16:1-17:4.

He was not included on the email communication that he attaches to his testimony from the Commission Staff member to the Auditor in AEP Ohio's PPA Audit. In fact, OCC witness Perez did not work at OCC during the time period that the email exchange occurred and did not work on the PPA Audit litigation, even though others at OCC did. Given these facts, it is indisputable that OCC witness Perez has no personal knowledge as to the meaning or intent of Staff's communication to the Auditor (or the Auditor's understanding of those communications) in the PPA Audit. OCC witness Perez simply read an email, and then inappropriately assigned intention and meaning by the author of the email, as well as understanding on the part of the Auditor, in the PPA Audit. And then, has improperly attempted to ascribe some meaning to it in a wholly separate audit proceeding multiple years later. Reading an email certainly does not constitute "personal knowledge." To this end, Mr. Perez would have no more personal knowledge than any individual who simply read the email he discusses.<sup>4</sup>

Under Ohio R. Evid. 602, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has *personal knowledge* of the matter. Mr. Perez's testimony on this topic is entirely inappropriate, does not require any expertise, does nothing to assist the trier of fact in this case, and is improper. It must be stricken from the record.

**B. The Perez Testimony Excerpts Constitute Impermissible Hearsay.**

Perez's Direct Testimony consists of him quoting from and incorporating arguments OCC made in the 2019 PPA Audit, in an attempt to bootstrap the same arguments into the underlying proceeding. Such a move both equates and conflates these two separate and distinct proceedings. This aspect of Perez's testimony is inadmissible, in addition to being irrelevant, as it relies upon hearsay offered for the truth of the matter asserted.

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<sup>4</sup> Mr. Perez does not allege that he has any particular expertise in interpreting written communications, or that he knows anything about working in public service or as an auditor, for example.

For example, in Q&A 19, Perez incorporates into his testimony emails and quotes referencing a draft report from the 2019 PPA Audit. In fact, none of the exchanges Perez recounts in his Direct Testimony in Q&A 19 actually *occurred in the underlying case*, see, e.g., “The auditor concluded in her draft audit report of AEP that “keeping the plants running does not seem to be in the best interest of the ratepayers.”<sup>5</sup> Perez goes on to quote, summarize, and draw conclusions for nearly 1.5 pages of his testimony regarding the email exchange between Auditor staff, PUCO Staff, and the draft audit report in Case No. 18-1004-EL-RDR. Again, none of these exchanges, and subsequently Perez’s testimony, are relevant to the underlying matter nor appropriate for inclusion and consideration. And importantly, his recounting of this entire exchange is clearly hearsay offered for the truth of the matter asserted.

Instead of litigating the 2020 Rider LGR Audit in earnest, OCC has chosen simply to introduce communications from the 2019 Ohio PPA Audit in the underlying proceeding, seeking to argue impropriety or undue influence in the underlying Audit. This inadmissible hearsay is obviously offered for the truth of the matter asserted.<sup>6</sup>

**C. The Perez Testimony and Exhibit are Irrelevant, Highly Prejudicial, and Will Cause Considerable Confusion in the Underlying Case.**

Even if the Commission somehow finds that the Perez Testimony is not riddled with hearsay, lacking in personal knowledge, or otherwise impermissible, the testimony and exchange contained in Exhibit JSP-3 are not relevant to the current proceeding, are highly prejudicial to all parties litigating this case, and would cause considerable confusion if permitted to remain in the LGR Audit proceeding record.

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<sup>5</sup> Perez Direct Testimony, 5:10-13 and 16:5-7.

<sup>6</sup> 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”).

**1. Inclusion of the Perez Testimony in is not relevant and challenges the Commission's prior Evidentiary Finding on relevancy.**

Under Ohio R. Evid. 402, irrelevant evidence is inadmissible. Under Ohio R. Evid. 401, relevant evidence “means 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.” The Perez testimony identified above, including Attachment JSP-3 is not relevant. It does not deal with this proceeding. The information discussed in Mr. Perez’s testimony pertains to the draft audit report for only one utility, in a different audit proceeding, under a different rider, and for a different time period. This “evidence” does not have any tendency to make the existence of any fact that is of consequence to the determination of this case more or less probable—the testimony does not involve facts in this case, and thus, cannot satisfy the very definition of relevancy. OCC witness Perez does not attempt to explain why details involving the PPA Audit proceeding are relevant here. In other words, it is not clear why OCC witness Perez is discussing the PPA Rider case for purposes of this LGR proceeding. Perez makes statements, but no direct connection.

Moreover, both nearly identical written direct testimony and the communications referenced in exhibit JSP-3 were previously found by the Commission to be likewise irrelevant as it relates to the audit proceeding of Duke Energy Ohio in the PSR Rider. The underlying audit is even more removed from that proceeding, where such testimony and exhibits were disallowed, making the relevance of the Perez testimony even more tenuous. In Duke’s Rider PSR, the Commission denied the admissibility of nearly identical testimony and the exact same exhibit offered on behalf of OCC witness Haugh, reasoning:

We find that the attorney examiner properly granted the motions to strike in both instances . . . We agree with the attorney examiner’s findings that the draft audit report, and Mr. Haugh’s testimony related to that report, lack relevance in this



proceeding. There are obvious similarities between the audits, as they were conducted by the same auditor, on similar timelines, and both concern similar OVEC riders. However, they were still completely separate audits. The evidence in question here pertains to a draft report, concerning a different rider, and a different EDU. As explained by the attorney examiner, the purpose of this proceeding is not to relitigate another EDU's rider. (Tr. Vol. III at 427.) While the Commission and the attorney examiners are not bound by the rules of evidence, OCC has not established that any substantial right was affected. Parties were given the opportunity to explore the relevancy of the draft audit report during the cross-examination of LEI's auditor, Dr. Marie Fagan, as well as to submit arguments as to the relevancy of the audit. Parties were able to cross-examine Dr. Fagan and to explore her and LEI's determinations regarding Duke's rider, as well as explore Staff's role in the auditing process. *See e.g.*, Tr. Vol. II at 182-215. Accordingly, we affirm the attorney examiner's rulings that the draft audit report and Mr. Haugh's related testimony are not relevant to this proceeding.<sup>7</sup>

The Commission addressed this very same question where OCC attempted to undermine the Auditor's independence based on irrelevant inadmissible hearsay. Similarly to the PSR Case, Mr. Perez opines in his testimony regarding the 2019 PPA Audit that "the Auditor acted improperly by willingly shedding her independence in what was supposed to be an independent audit," "the auditor's independence was clearly compromised," and that in the underlying matter, "given the past evidence that the Auditor changed the audit findings in response to a Staff requests, the Auditor's independence in this case is called into question."<sup>8</sup> Ultimately, in the PSR Opinion and Order, the Commission concluded that it did not "find any evidence of undue influence in the creation of the [AEP] audit report or any reason to consider that LEI was prevented from conducting an independent review" and affirmed "the attorney examiner's decision to keep the draft report out of the formal record in this proceeding. In doing so, the Commission concludes that it is not relevant in this proceeding."<sup>9</sup>

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<sup>7</sup> *In the Matter of the Review of the Price Stabilization Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order at 8-9 (September 6, 2023).

<sup>8</sup> Perez Direct Testimony, 16:19-23 and 17:1-3.

<sup>9</sup> *See* Case No. 20-167-EL-RDR, Opinion and Order at 9 (September 6, 2023).

The testimony from Perez noted above represents a direct challenge to the Commission's prior Evidentiary Ruling in Rider PSR, and OCC has not demonstrated why it is any more relevant in the underlying proceeding than it would have been in Rider PSR. The same reasoning should be applied in the underlying case.

**2. The Perez Testimony and Exhibit JSP-3 are highly prejudicial and muddy the record in the underlying proceeding.**

Assuming *arguendo*, the evidence was found to be relevant (the EDUs strongly assert that it is not) the testimony should not be permitted because it is highly prejudicial. Ohio R. Evid. 403(A) states that even if evidence is relevant, it is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. An extensive hearing was held in the PPA Rider case, and this topic, *i.e.*, Staff's communication(s) with the Auditor with respect to the PPA Rider, was discussed at great length. Two of the utilities who are parties to this proceeding were not a party to that case. The PPA Rider case was based upon a different audit report, different audit period, different rider, and different findings. It would be highly prejudicial to the parties (and Staff) to allow testimony relating to the PPA Rider case (discussing the draft audit in that case) in this entirely separate proceeding. Particularly by a witness who did not even participate in that proceeding. OCC should not be given another bite at the apple to bolster its position in the PPA Rider case through the LGR case. A decision is yet outstanding in the PPA Rider matter, and the question of admissibility in that case for the matters OCC seeks to introduce in this entirely separate proceeding is also outstanding. Exclusion is mandatory if there is danger of prejudice.

Like the argument regarding prejudice above, even if the testimony is found to be relevant (it is not), permitting the testimony will cause confusion in the record. As already explained, this testimony discusses an entirely separate proceeding, which proceeding has been fully litigated and briefed. The Attorney Examiners are different. The utilities involved are not the same. The

intervening parties involved are different. The Staff members who worked on each case are different. Permitting this testimony will cause confusion to the LGR record.

Again, Ohio R. Evid. 403(A) does not permit relevant evidence if its probative value is substantially outweighed by the danger of confusion. Exclusion is mandatory if there is danger of confusion. And the Perez testimony is riddled with confusion. For example, Q&A 19 on page 16 is hugely confusing. The question states: “DID YOU REVIEW ANY INFORMATION FROM LONDON ECONOMIC’S [sic] 2019 AUDIT OF THE OVEC COAL PLANTS WHICH CAUSED YOU CONCERN?” The answer goes on to reference “London Economic’s [sic] audit of the OVEC plants for 2019,” not clearly stating which utility was being audited or that the audits were conducted separately and subject to separate hearing proceedings. Likewise, stating things like “[t]he Auditor and the PUCO staff acted improperly[,]” with no additional context, it is nearly impossible to tell which audit proceeding Perez is even referencing. OCC witness Perez’s testimony attempts to portray the PPA Audit proceeding and the underlying LGR proceeding as one in the same, extensions of the same process. This is wrong and will cause confusion. It is also intentionally meant to mislead. This testimony paints a picture of events (one that Staff and AEP Ohio vehemently opposed in the PPA Audit, and one which the Commission has yet to make important evidentiary and substantive rulings upon) as pertaining to this proceeding. But this testimony is not referencing the underlying audit proceeding. Mr. Perez should not be allowed to insinuate that it does. Such actions are highly prejudicial and should be precluded.

### III. CONCLUSION

For the multitude of reasons explained above, the testimony of Perez on pages 2, 3, 5, and 16 and Attachment JSP-3 should be stricken. This testimony and attachment are improper. The testimony is irrelevant. Mr. Perez has not established he is an expert witness who can render an opinion on communications. Nor does Mr. Perez have personal knowledge. Even assuming the testimony is relevant (it is not), it should not be permitted because the potential for prejudice and confusion outweighs its probative value.

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 30<sup>th</sup> day of October, 2023, via e-mail.

/s/ Elyse H. Akhbari

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Summary: Motion Duke Energy Ohio, Inc., AES Ohio, and Ohio Power Company's Motion to Strike Specific Intervenor Pre-Filed Direct Testimony electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Akhbari, Elyse Hanson and Kingery, Jeanne and Vaysman, Larisa.