BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO, INC. AND AES OHIO'S
MEMORANDUM IN OPPOSITION TO CERTAIN INTERVENORS'
MOTION TO TAKE ADMINISTRATIVE NOTICE

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel (OCC), the Ohio Manufacturers' Association–Energy Group (OMAEG), and the Kroger Co. (Kroger) (collectively, the Intervenors) ask that the Public Utilities Commission of Ohio (the Commission) take administrative notice in the underlying proceeding of three hearing transcript volumes and eight hearing exhibits from the Ohio Power Company's (AEP Ohio) PPA Rider Audit (PPA Audit) for calendar year 2019. The Commission should deny the Intervenors' motion for three reasons: (1) the documents presented do not qualify for administrative notice under Ohio Evid. R. 201; (2) the information sought is not relevant to this proceeding and is prejudicial; and (3) despite the Intervenors' motion, the Commission and the utilities are without adequate notice of what "adjudicative facts" the Intervenors intend to present via administrative notice.

Indeed, in Duke Energy Ohio's Rider PSR case, the Commission affirmed rulings by the Attorney Examiner that refused to admit evidence from AEP Ohio's PPA Rider case into Duke

Energy Ohio's.[1] Moreover, the Attorney Examiner in AES Ohio's Reconciliation Rider case refused to take administrative notice of the transcript from the AEP Ohio PPA Rider case.[2] There is no compelling reason to overturn these prior findings in the present case. For all of the reasons detailed below, the Commission should decline to take administrative notice of the information identified in the Intervenors' motion, particularly:

	Administrative Notice Requested	**Denial of Motion Grounds**
1	Hearing Transcript Volume I, Marie Fagan Direct and Cross-Examination (Jan. 26, 2022).	Irrelevant, prejudicial, not a "fact" for which judicial notice can be taken under Ohio Evid. R. 201, and previously disallowed from evidence in Rider PSR and Reconciliation Rider.
2	Hearing Transcript Volume II, Marie Fagan Cross-Examination (Jan. 27, 2022).	Irrelevant, prejudicial, not a "fact" for which judicial notice can be taken under Ohio Evid. R. 201, and previously disallowed from evidence in Rider PSR and Reconciliation Rider.
3	Hearing Transcript Volume III, Admission of Exhibits, pages 648-709 (Jan. 28, 2022).	Irrelevant, prejudicial, not a "fact" for which judicial notice can be taken under Ohio Evid. R. 201, and previously disallowed from evidence in Rider PSR and Reconciliation Rider.
4	PUCO Staff Exhibit 1, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company, Public Version (Sept. 16, 2020).	To the extent it is used in concert with emails referenced below, prejudicial, and irrelevant to underlying proceeding.
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).	To the extent it is used in concert with emails referenced below, prejudicial, and irrelevant to underlying proceeding.
6	PUCO Staff Exhibit 2, Prepared Testimony of Marie Fagan (Dec. 29, 2021).	Prejudicial, not a "fact" for which judicial notice can be taken under Ohio Evid. R. 201, and previously disallowed from evidence in Rider PSR and Reconciliation Rider.

[1] *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 7-9 (September 6, 2023).
[2] *In the Matter of the Review of the Reconciliation Rider of AES Ohio,* Case No. 20-165-EL-RDR, Hearing Transcript Vol. II 315:18-19, 316:13-21, and 325:10-12.

7	NRDC Exhibit 2, Emails between PUCO and OVEC Auditor (Jan. 27, 2022).	Irrelevant, prejudicial, not a "fact" for which judicial notice can be taken under Ohio Evid. R. 201, and previously disallowed from evidence in Rider PSR and Reconciliation Rider.

II. LAW AND ARGUMENT

A. The Intervenors Seek Administrative Notice for Information that is not Properly Contemplated for Administrative Notice Under Ohio Evid. R. 201(B).

In seeking to take administrative notice of the entire transcript covering cross examination of the Auditor in a prior docket under a previous rider, which prior docket addressed just one utility, the Intervenors seek to expand the meaning of administrative notice, as dictated by Ohio Evid. R. 201(B). As the Intervenors admit, administrative notice is governed by Ohio Evid. R. 201. The fundamental requirement of judicial or administrative notice is that the notice relates to an adjudicative fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."[3] The full cross examination of the Auditor, and corresponding disputed exhibits, does not clear the standard for administrative notice and should not be wholesale approved by the Attorney Examiners in this case.

Moreover, administrative notice is typically taken of "facts" and those facts must not be in dispute. The cross examination of the Auditor in a separate and distinct proceeding, in its entirety without reference to any particular facts at all, is certainly not an appropriate use of the function of administrative notice.[4] Taking administrative notice of a date, of the existence of a particular

[3] *See* Ohio Evid. R. 201(B).

[4] *See In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. Section 4928.143 in the Form of an Electric Security* Plan, Case No. 12-1230-EL-SSO, Hearing Tr. Vol. I at 29 (rejecting the incorporation of the entire record, including hearing transcripts, of a separate case into a separate and distinct proceeding, even one involving similar parties and the same utility, finding "I am uncomfortable incorporating wholesale the entire record from 10-388.").

sum or dollar amount in another proceeding, or of an address—these are examples of "facts" that can be subject to administrative notice. These are verifiable, duplicable, commonly known facts. The entirety of a cross examination is not the type of information subject to administrative notice, nor should it be. Given the extensive cross examination, briefing, and argument in the PPA Audit case, there was clearly much "dispute" as it relates to the "facts" that the Intervenors attempt to bootstrap into this proceeding here.

The Staff Notes for Ohio Evid. R. 201(B) support the fact that the information subject to administrative notice must be a verifiable fact. The Staff Notes to Ohio Evid. R. 201(B) explain:

> Rule 201(B)(1) applies to adjudicative facts generally known within the territorial jurisdiction. This category relates to the type of fact that any person would reasonably know or ought to know without prompting within the jurisdiction of the court and includes an infinite variety of data from location of towns within a county to the fact that lawyers as a group enjoy a good reputation in the community. A second class of facts subject to judicial notice is provided by Rule 201(B)(2). These are facts capable of accurate and ready determination . . . The type of fact contemplated by 201(B)(2) includes scientific, historical and statistical data which can be verified and is beyond reasonable dispute.

The alleged "facts" for which administrative notice is sought by the Intervenors in this proceeding were reasonably disputed in the PPA Audit case—by Commission Staff and AEP Ohio, for example. They are not facts at all, but cross examination testimony. Likewise, introduction of administratively noticed documents that were subject to strong objections from numerous interested parties at the evidentiary hearing in the PPA Audit case makes clear that these are not facts "beyond reasonable dispute" under Ohio Evid. R. 201(B)(2). Moreover, the information in a complex, utility audit proceeding before the Commission is surely not the "type of fact that any person would reasonably know or ought to know" and therefore falls well outside the scope of Evid. R. 201(B)(1).

Finally, the information included in the Intervenors' list for administratively noticed documents is neither "capable of accurate and ready determination" nor "scientific, historical and statistical data which can be verified and is beyond reasonable dispute," as required by Ohio Evid. R. 201(B)(1). Instead, the vast majority of the documents included in the list provided by the Intervenors include opinions and testimony disputed and debated heavily in the PPA Audit case, and information whose admissibility has yet to be formally ruled upon via Commission decision in that docket. It is also information that is prejudicial, meant to confuse or obfuscate, and irrelevant to the underlying proceeding. As further discussed below, Duke Energy Ohio and AES Ohio, who were not participants in the 2019 Rider PPA Audit proceeding, would be particularly prejudiced because such a ruling would drastically reduce OCC, OMAEG, and Kroger's cross-examination burden in the underlying case. It would also prevent Duke Energy Ohio and AES Ohio from having the opportunity to review, explain, and/or rebut the information subject to administrative notice. Presumably such information will be relied upon by OCC/OMAEG/Kroger wholesale in their briefing.

For these reasons, the Commission should conclude that the Intervenors do not present "facts" subject to administrative notice. The information they seek notice of is entirely outside the scope of the type of information appropriate for administrative notice.

B. Adopting, Wholesale, the Transcript from the PPA Audit Case, and Corresponding Exhibits, would be Highly Prejudicial to the Parties to this Proceeding.[5]

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

[5] Duke Energy Ohio incorporates by reference and fully herein the arguments set forth in its Motion to Strike particular testimony of OCC Witness Perez, as it relates to discussion of materials from the PPA Audit proceeding.

without the evidence." The admission of the transcript and corresponding exhibits from the PPA Audit proceeding identified in the Intervenors' motion is not relevant to the case at hand. The information discussed in the cross-examination transcript relates to the draft audit report for only one utility, in a different audit proceeding, under a different rider, and for a different time period than what is at issue here. 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 at all, and thus, cannot satisfy the very definition of relevancy. Imagine, for instance, that the Auditor is questioned in the underlying docket and the Intervenors do not receive a response or admission on cross examination that is to their liking. Would they then be able to simply cite to the transcript from AEP Ohio's Rider PPA Audit hearing, in place of citing to or addressing the actual live testimony of the Auditor at the actual hearing in this case? This can surely not be a permissible outcome and would certainly taint the record in the underlying case.

While the Intervenors seek to obtain similar testimony from the Auditor in the underlying proceeding, the present case is not simply an extension of the PPA Audit proceeding. First, the law under which the present proceeding takes place is wholly separate and different than the PPA Audit, which was established by Commission rule and not in statute. Second, the participating parties (utility and intervenor) are different in the underlying case than they were in the PPA Audit. Third, not only are the parties different, but Duke Energy Ohio and AES Ohio had their own 2019 audits pursuant to their former riders. It would be hugely prejudicial to allow one such transcript into the record when the full picture is much different than that sought to be presented by the Intervenors. As a separate and distinct proceeding, subject to a separate and independent audit

analysis from the PPA Audit in 2019, it is hugely improper for the Intervenors to attempt to rely upon their cross examination of the Auditor from a different case.

Moreover, the Intervenors do not even attempt to explain why details involving the PPA Audit proceeding are relevant here, to say nothing of why they cannot elicit, on cross examination, testimony regarding the Auditor's independence, impartiality, or propriety (or lack thereof, as they claim) in the current proceeding. In other words, it is not clear why exactly the Commission should muddy the record by allowing the Intervenors to cite to and adopt wholesale their cross examination in another proceeding concerning only one of the three utilities at issue in the underlying hearing in this case. In making this considerable "ask," the Intervenors' only intent can be to obfuscate the record of the underlying case.

The Commission should also note that similar arguments regarding admissibility and relevance were previously made by OCC, OMAEG, and Kroger in Duke Energy Ohio's Rider PSR, Case No. 20-167-EL-RDR and in AES Ohio's Reconciliation Rider, Case No. 20-165-EL-RDR (Reconciliation Rider). In Rider PSR, the Commission found the testimony and draft audit report in the PPA Audit to be likewise irrelevant and therefore inadmissible as it related to the audit proceeding of Duke Energy Ohio in its Rider PSR. The underlying LGR Audit is even more removed from that Rider PSR proceeding where such testimony and exhibits were disallowed, as it concerns an entirely different rider, a different audit time period, and different utilities and parties. These facts make the relevance of the PPA Audit transcript and corresponding exhibits even much more tenuous. In the Commission's Order regarding Duke's Rider PSR, where the Commission denied the admissibility of the transcript and exhibits regarding the PPA Audit when OCC attempted to sponsor them and include them in the record via its witnesses, it reasoned:

> 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.[6]

Likewise, in AES Ohio's Reconciliation Rider, the Intervenors sought to admit the transcript and cross examination from the PPA Audit into the record, stating "[a]nd by that what I mean is the auditor's testimony from the evidentiary hearing in Case No. 18-1004 . . . I would simply ask that if those two documents are going to be admitted [the PSR and PPA Audit reports] into evidence, that the Commission take administrative notice of Ms. Fagan's testimony from the evidentiary hearing in Case No. 18-1004[.]"[7] After consideration, the attorney examiner in the Reconciliation Rider determined that administrative notice of the PPA Audit hearing transcript was improper, holding: "I will not be taking administrative notice of the auditor's testimony whether prefiled or on cross-examination in either case."[8]

As demonstrated above, the Commission has previously addressed this very same question where OCC attempted to undermine the Auditor's independence based on irrelevant transcript

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[6] *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).
[7] *In the Matter of the Review of the Reconciliation Rider of AES Ohio*, Case No. 20-165-EL-RDR, Hearing Transcript Vol. II 315:18-19 and 316:13-21.
[8] *Id.* at 325:10-12.

references from the PPA Audit. Similarly, here, as is evident in the Intervenors' motion, they attempt to confuse the record and drag the PPA Audit into the underlying proceeding, without parsing the facts the Intervenors seek to rely upon, and without even tempering the ways the transcript and exhibits they seek to enter into the record in the underlying proceeding could be used.

The Intervenors' intention to conflate the two proceedings (PPA Audit and LGR Audit) is evident on the face of their motion. For example, they state, "[t]he Evidentiary Materials are relevant to prove that the audit report [in the LGR Audit] was not "independent" as required by the PUCO's Entry hiring London Economics as the auditor"—demonstrating that the Intervenors clearly intend to use the information for which they request administrative notice to state that the Auditor was not independent or impartial in the current proceeding, having found no evidence to demonstrate otherwise in this case. Likewise, the Intervenors state that, "[k]nowing that Ms. Fagan said in her draft report [in the PPA Audit] that 'keeping the plants running does not seem to be in the best interests of the ratepayers' and that she eliminated this statement [in a different audit proceeding, not the underlying audit] 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 [in the LGR Audit] because she removed the statement from her final report at the PUCO Staff's request [in the PPA Audit]."[9] It is clear from the Intervenors' own motion what their intention is in seeking administrative notice of the materials they identify.

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

[9] Intervenors' Motion at 4-5.

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."[10] There is no reason that the Attorney Examiners should find differently in the underlying proceeding. This information, used for the purposes clearly stated by the Intervenors, is highly prejudicial, was not allowed to muddy the record in PSR Rider, and is disputed by Staff, AEP Ohio, and others in the rider proceeding in which it was introduced.

Assuming, *arguendo*, the materials the Intervenors seek to introduce via administrative notice were found to be relevant (they are not), the testimony should still 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 Audit case, and this topic, *i.e.*, Staff's communication(s) with the Auditor with respect to the PPA Audit, was discussed at great length. Two of the utilities who are parties to this proceeding were not a party to that case. The PPA Audit case was based upon a different audit report, a different audit period, a different rider, and different findings. It would be highly prejudicial to the parties (and Staff) to allow testimony relating to the PPA Audit case (discussing the draft audit in that case) in this entirely separate proceeding. The Intervenors should not be given another bite at the apple to bolster their position in the PPA Audit case through the LGR Audit. A decision is yet outstanding in the PPA Audit, and the question of admissibility in that case for the matters the Intervenors seek to introduce in this entirely separate proceeding is also outstanding. Exclusion is mandatory if there is danger of prejudice.

[10] *See* Case No. 20-167-EL-RDR, Opinion and Order at 9 (September 6, 2023).

C. **Despite Filing a Motion, the Intervenors Do Not Provide Adequate Notice of what "Facts" they Intend to Rely Upon or Utilize from the PPA Audit at the LGR Adjudicatory Hearing.**

There is neither an "absolute right for nor an absolute prohibition against the commission taking administrative notice of facts outside the record of a case."[11] Rather, each case must be resolved on its facts, and "the factors [this court] deem[s] significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed."[12] The Intervenors claim that, by their motion, the parties to this case have had an adequate time to review and rebut the "evidence" the Intervenors seek to enter into the record via administrative notice. But the scope and breadth of what the Intervenors propose renders that "adequate time" effectively meaningless. As the parties currently stand, it appears that the Intervenors intend to offer the entirety of a multi-day hearing transcript for the purposes of impeachment and/or to rely upon in briefing to supersede the actual record in this case. That is in no way sufficient "notice" to the utilities upon which particular "facts" the Intervenors seek notice. For example, looking only at the transcript that the Intervenors want to take notice of, that document is at least 800 pages in length. The Intervenors do not bother to point out particular "facts" for administrative notice within this transcript. This is not adequate notice, even though the Intervenors went through the motions of making a filing for administrative notice.

Moreover, the Intervenors fail to demonstrate why they cannot probe the Auditor's propriety, truthfulness, thoroughness, or independence in other, less prejudicial ways, via the week-or-more long adjudicatory hearing about to be held in the LGR Audit. Intervenors have collectively estimated upwards of 15 hours of cross examination for the Auditor in the LGR

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[11] *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 8, 1995-Ohio-282, 647 N.E.2d 136 (1995).
[12] *Allen v. Pub. Util. Comm.*, 40 Ohio St. 3d 184, 186, 532 N.E.2d 1307 (1988).

proceeding. Given those estimates, Intervenors are clearly not seeking administrative notice of the PPA Audit transcript and exhibits in order to introduce any efficiencies into the underlying hearing, nor do they assert that they are doing so in their motion. Though the Intervenors cite "impeachment" purposes in their motion, impeachment is an issue that arises during the course of cross examination. They cannot know that they will seek to impeach the Auditor with at this juncture. And even if utilized for impeachment, the entire PPA Audit hearing transcript would not be admissible into evidence at the LGR Audit hearing, as the Intervenors request via their motion.[13] The Intervenors cannot "divine" what impeachment methods they will pursue at the LGR hearing, because that hearing has not taken place yet. This speaks again to the notice aspect, or lack therof, regarding their motion. The Intervenors actual motives are clear in seeking administrative notice related to the PPA Audit. They seek to draw improper conclusions and avoid thorough cross examination, instead cherry-picking lines of questioning from the PPA Audit proceeding. The Commission should not be persuaded: the Intervenors have not met their burden in meriting administrative notice of these extensive materials.

III. CONCLUSION

For the reasons set forth above, and relying on past Commission precedent, Duke Energy Ohio and AES Ohio request that the attorney examiners deny the Intervenors' Motion to Take Administrative Notice, and prevent the Intervenors from wholesale allowing the PPA Audit transcript, and corresponding exhibits, in the underlying proceeding.

[13] Ohio Evidence Rule 616 governs impeachment of witnesses and would control the use and context, if the hearing mandated such impeachment.

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 30th day of October, 2023, via e-mail.

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Summary: Memorandum Duke Energy Ohio, Inc. and AES Ohio's Memorandum in Opposition to Certain Intervenors' Motion to Take Administrative Notice 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.