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

OHIO POWER COMPANY'S MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL AND APPLICATION FOR REVIEW OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Under Ohio Administrative Code ("OAC") 4901-1-15(D), Ohio Power Company ("AEP Ohio") submits this Memorandum Contra the "Interlocutory Appeal and Application for Review" filed by the Ohio Manufacturers' Association Energy Group ("OMAEG") on November 13, 2023 in the above-captioned proceeding.

On October 30, 2023, AEP Ohio; Duke Energy Ohio, Inc. ("Duke"); and Dayton Power and Light Company ("AES Ohio," and collectively with AEP Ohio and Duke, the "Utilities") filed a written motion to strike certain portions of the testimony of OMAEG witness John Seryak. The Utilities argued that Mr. Seryak's testimony concerning the H.B. 6 investigation and the Commission's rationale in approving the now-replaced PPA Rider were inflammatory and not relevant to the statutorily mandated issue in this case: the reasonableness and prudence of the Utilities' actions with respect to OVEC in the 2020 audit year. In the week that passed before Mr. Seryak took the stand on November 6, 2023, OMAEG declined to file any written response to the Utilities' motion to strike, choosing instead to respond orally to the motion in the hearing. This oral response failed to overcome the Utilities' arguments, and following longstanding, well-

established precedent, the Attorney Examiners issued an oral ruling partially granting the Utilities' motion and striking certain portions of Mr. Seryak's testimony.

OMAEG then filed an interlocutory appeal raising a confused tangle of hyperbolic rhetoric, baseless procedural grievances, and near-*ad-hominem* attacks on the Attorney Examiners. OMAEG's arguments are improper and meritless, and its appeal should be denied.

I. OMAEG Offers No Grounds for an Interlocutory Appeal Under OAC 4901-1-15.

OMAEG's interlocutory appeal should be dismissed because it does not satisfy any of the grounds for an interlocutory appeal in OAC 4901-1-15. Instead, OMAEG must raise its arguments in its post-hearing briefs.

Rule 4901-1-15 presents two procedures for an interlocutory appeal. Under Section (A), a party may bring an "immediate interlocutory appeal" if the challenged order "does any of the following":

> (1) Grants a motion to compel discovery or denies a motion for a protective order.
>
> (2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.
>
> (3) Refuses to quash a subpoena.
>
> (4) Requires the production of documents or testimony over an objection based on privilege.

OAC 4901-1-15(A)(1)-(4). If an order does not do any of the things enumerated in Section (A), Section (B) of OAC 4901-1-15 requires the party to ask the "legal director, deputy legal director, attorney examiner, or presiding hearing officer" to "certify" the interlocutory appeal. Such certification is only permitted on a limited basis:

> 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).

Here, as described below, OMAEG is not entitled to an "immediate" interlocutory appeal under OAC 4901-1-15(A), and OMAEG falls short of the standard for certification under OAC 4901-1-15(B).

A. OMAEG Is Not Entitled to an Immediate Interlocutory Appeal Under OAC 4901-1-15(A).

OMAEG is not entitled to an "immediate" interlocutory appeal because, contrary to OMAEG's assertion, the challenged Order did not "terminate[] [OMAEG's] right to participate in a proceeding." OAC 4901-1-15(A)(2). The only prong of OAC 4901-1-15(A) that OMAEG (Mem. at 8) relies on is Subsection (2), which permits an immediate interlocutory appeal if the challenged order "terminates a party's right to participate in a proceeding." OAC 4901-1-15(A)(2).

In no way, shape or form did the Attorney Examiner's decision to strike portions of Mr. Seryak's testimony "terminate" OMAEG's "right to participate" in this proceeding. As the Attorney Examiners and all parties who were present at the hearing can attest, OMAEG has participated vigorously in this proceeding and no doubt will continue to do so. At the hearing, OMAEG was permitted to cross-examine the auditor and all utility witnesses for hours upon hours. OMAEG made motions to strike, and OMAEG vociferously made and opposed evidentiary objections to cross-examination questions. Going forward, OMAEG will be fully permitted to file a post-hearing brief and reply brief (where, among other things, OMAEG may raise all the arguments in its interlocutory appeal), and if it chooses, OMAEG may file an

application for rehearing of the Commission's decision and appeal that decision to the Ohio Supreme Court. None of these forms of participation were "terminated."

Moreover, the relevant positions and substantive explanation supporting OMAEG witness Seryak's testimony was left intact after the portions were stricken. In particular, the challenged Order was surgical, removing only selected the inflammatory, irrelevant portions of Mr. Seryak's testimony. For instance, Mr. Seryak was allowed to make his lengthy (and wrong) argument concerning the meaning of "unconditional obligation" in the Inter-Company Power Agreement ("ICPA") and how it relates to the statute. OMAEG Ex. 1 (Seryak Testimony) at 16-19. Mr. Seryak, furthermore, was permitted to address the "must-run" commitment issue in full – not one line from this part of his testimony was stricken. *See id.* at 20-23. And the same is true of the fuel cost issue – no part of Mr. Seryak's testimony concerning fuel costs was stricken. *See id.* at 23-26. Accordingly, the order granting the motion to strike left OMAEG wide latitude to address these central issues in the case (namely, the specific OVEC costs relevant to the 2020 audit), there is no sense in which OMAEG witness Seryak's testimony was eliminated – let alone OMAEG's "right to participate" being "terminated." OAC 4901-1-15(A)(2).

Instead of "terminat[ing]" OMAEG's "right to participate," the Attorney Examiner simply made an evidentiary ruling restricting the scope of the evidence that OMAEG's was allowed to enter into the record, and that type of ruling does not meet the high bar for an "immediate" interlocutory appeal under OAC 4901-1-15(A)(2). As discussed at length below, the Attorney Examiner's evidentiary ruling was entirely correct and should be upheld. But regardless of the merits of the evidentiary ruling, the rules generally require that parties raise evidentiary issues in their post-hearing briefs. The plain language of Subsection OAC 4901-1-

15(A)(2) supports this conclusion. The word "terminate" means "to bring to an end."[1] Therefore, an "immediate" interlocutory appeal is authorized only when a party's participation in the proceeding is *ended*. For example, OAC 4901-1-15(A)(2) expressly permits an "immediate" interlocutory appeal where an order "[d]enies a motion to intervene," OAC 4901-1-15(A)(2), thus precluding a party from presenting testimony, cross-examining witnesses, etc. "Terminate" is not the same as "restrict" or "limit." Orders that restrict or limit evidence must be challenged in post-hearing briefs. To hold otherwise – to water-down "terminate" so it means merely "restrict" or "limit" – would eviscerate the clear requirement for an "immediate" interlocutory appeal and subject dozens of routine evidentiary rulings in every hearing to "immediate" interlocutory appeals.

Notably, OMAEG does not argue that its "right to participate" was "terminated" by the order, but rather that it was "*effectively* terminated." OMAEG Mem. at 15 (emphasis added). OMAEG, however, does not cite any precedent or standard for "effective" termination under OAC 4901-1-15(A)(2), and regardless of whether there might be extreme cases where an evidentiary ruling "effectively" terminates a party's "right to participate," this is not such an extreme case. As noted above, OMAEG was afforded hours and hours to cross-examine witnesses, make evidentiary objections, etc., and OMAEG's witness was given ample latitude to discuss the central questions of the proceeding, including "must-run" commitment and fuel costs. Even if there were a standard for "effective" termination under OAC 4901-1-15(A)(2) (OMAEG cites none), the Order's narrow evidentiary ruling could not possibly fulfil it. The evidentiary ruling did not impinge on the countless, meaningful ways in which OMAEG has participated and

[1] https://www.merriam-webster.com/dictionary/terminate.

will continue to participate in this hearing. Therefore, the evidentiary ruling is one that OMAEG must – and absolutely can – address in its post-hearing briefs, not in an "immediate" interlocutory appeal.

B. OMAEG's Request to Certify an Interlocutory Appeal Under OAC 4901-1-15(B) Should Be Denied.

Since OMAEG is not entitled to an "immediate" interlocutory appeal under OAC 4901-1-15(A), OMAEG must seek certification of an interlocutory appeal under OAC 4901-1-15(B). OMAEG, however, also falls far short of the specific and limited standard for certification. As noted above, a party requesting certification of an interlocutory appeal must show two things: First, the party must demonstrate 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." OAC 4901-1-15(B). Second, the party must show that "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." *Id.* These two prongs of the standard in OAC 4901-1-15(B) are separated by the word "and," and thus a party must satisfy *both*. Here, OMAEG satisfies neither.

On the first prong of OAC 4901-1-15(B), OMAEG argues that the challenged order "represent[s] a departure from past precedent" (OMAEG Mem. at 16), but far from being a "departure," the challenged order is entirely consistent with past precedent addressing the scope of OVEC audits. For instance, in Case No. 20-167-EL-RDR, which addressed Duke's 2019 OVEC audit, the Commission broadly upheld the exclusion of evidence concerning "a different rider, and a different EDU," since the evidence concerned "completely separate audits." Opinion & Order ¶ 34, *In re Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR (Sep. 16, 2023). That rationale is consistent with the Attorney Examiner's

exclusion of OMAEG's testimony concerning AEP Ohio's prior PPA Rider, which was "a different rider" that has been "replaced" by statute. *See* R.C. 4928.148 (providing that prior OVEC recovery mechanism "shall be replaced" by the LGR).

The order striking portions of Mr. Seryak's testimony was also consistent with the Attorney Examiner's prior written rulings in this case. In partially quashing an OCC subpoena, the Attorney Examiner clearly articulated that "this proceeding is limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during calendar year 2020, *rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019*." Entry ¶ 33, *In re OVEC Generation Purchase Rider Audits Required by R.C. 4928.148*, Case No. 21-477-EL-RDR (July 7, 2023) (emphasis added). Neither OMAEG nor OCC sought an interlocutory appeal of this decision, and OMAEG was fully aware of the Attorney Examiner's limitations on the scope of this case when it filed its witness's testimony over three months later, on October 10, 2023. Thus, when portions of OMAEG's testimony relating to H.B. 6 and the PPA Rider were stricken, it was a predictable, consistent application of the previously articulated rule that the scope of this case does not include "the events leading up to the creation and implementation of the LGR mechanism." *Id.* That was not a "departure from past precedent" under the first prong of OAC 4901-1-15(B), but rather the continued application of a well-established rule.

On the second prong of OAC 4901-1-15(B), OMAEG fails to establish "an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense, should the commission ultimately reverse the ruling in question." OMAEG has suffered and will suffer *no* prejudice – let alone "undue" prejudice" – "should the commission ultimately reverse the ruling in question." That is because OMAEG may challenge the Order

and make all its arguments against the Order in its post-hearing brief, and if OMAEG prevails, the Commission may order appropriate relief, including the admission of the stricken testimony into the evidentiary record. If that happens – if the Commission "reverses the ruling in question" and the stricken testimony is admitted – OMAEG will suffer no prejudice of any kind. In fact, the only parties who would suffer prejudice if the Commission were to admit the stricken testimony would be the Utilities, who would have been denied the opportunity to cross-examine OMAEG's witness on the stricken testimony.[2]

II. OMAEG's Appeal Fails on Its Merits: It Was Entirely Proper for the Attorney Examiner to Strike the Portions of Testimony at Issue.

Regardless of whether OMAEG's appeal is dismissed for failing to establish the prerequisites of OAC 4901-1-15 (it should be), OMAEG's appeal also fails on its merits. The Attorney Examiner's decision to strike the selected portions of OMAEG's testimony was sound.

The Attorney Examiner struck two categories of testimony: (1) testimony related to federal investigations concerning H.B. 6, and (2) testimony addressing the Commission's former rationale for approving AEP Ohio's PPA Rider and the other Utilities' OVEC Riders. Neither of these categories of testimony was related to the statutorily mandated question in this proceeding: "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in [OVEC]" during the 2020 audit year. R.C. 4928.148(A)(1). Accordingly, the inflammatory and irrelevant testimony passages were appropriately stricken.

As discussed immediately below, OMAEG's appeal puts forward many arguments about the stricken testimony, but these are misleading, inapplicable, and meritless.

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[2] AEP Ohio reserves all rights to make arguments about appropriate relief or corrective action if the Commission ultimately determines that any portions of the stricken OMAEG testimony should be admitted into the record.

A. There Was No Equivalence Between the Utilities' Brief Reference to the Former OVEC Riders for Background and Mr. Seryak's Detailed Discussion of the Commission's Rationale for Approving the Now-Replaced PPA Rider.

OMAEG (at 19-22) claims that there was a double standard. According to OMAEG, the Utilities' witnesses were permitted to testify about "the prior OVEC riders," yet the Attorney Examiner struck OMAEG's testimony about what OMAEG regards as the same topic. As an initial matter, no utility witness discussed the H.B. 6 investigations. OMAEG (at 25-26) argues that the auditor and the Utility witnesses referenced H.B. 6, but these references merely named the law that created the LGR. Neither the Auditor nor any Utility witness discussed the H.B. 6 *investigations* or in any way linked those investigations to the prudence of the Utilities' 2020 OVEC costs, as Mr. Seryak attempted to do. Not even OCC's witnesses attempted to inject the issue of the H.B. 6 investigations into this case. Thus, OMAEG's double standard argument cannot possibly apply to the portions of OMAEG's stricken testimony relating to the H.B. 6 investigations.

As for the remaining parts of the stricken testimony relating to the former PPA Rider, there was no double standard because there was no equivalence between the Utility witnesses and Mr. Seryak. To the extent they mentioned former OVEC Riders, the Utility witnesses merely provided *historical background information* about the former riders. For instance, Duke witness Ziolkowski merely provided a brief "history" of the LGR Rider by noting the date that Duke's former Rider PSR was effective and explaining that the LGR Rider constitutes the statutorily mandated replacement for Rider PSR. Duke Ex. 3 (Ziolkowski Testimony) at 4.

By contrast, OMAEG witness Seryak quoted at length from the Commission order approving AEP Ohio's PPA Rider and attempted to apply the Commission's former rationale for approving the PPA Rider to somehow evaluate the prudence of costs under the LGR Rider. For instance, in the stricken testimony, Mr. Seryak went into detail about how the former riders were

approved as "rate stability charges," and he quoted at length from Commission Haque's concurring opinion about his expectations for the former rider. This went far beyond what any Utility witness did and raised irrelevant passages from a prior decision that is not applicable in this case by virtue of intervening legislation. None of the Utility witnesses quoted from the original orders approving the former OVEC Riders, and they certainly did not attempt to apply the now-inapplicable standards from those cases here.

Thus, it was not the mere mention of the former OVEC Riders that caused Mr. Seryak's testimony to be stricken, as OMAEG misleadingly implies. Rather, it was Mr. Seryak's detailed exploration of inapplicable standards in a different, replaced rider that made his testimony irrelevant and misleading. *See* R.C. 4928.148 (providing that prior OVEC recovery mechanism "shall be replaced" by the LGR). The Attorney Examiner's decision to strike that Mr. Seryak's testimony concerning the justification and rationale of the former PPA Rider was consistent prior precedent that limits OVEC audits to the rider at issue. *See* Opinion & Order ¶ 34, *In re Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR (Sep. 16, 2023) (upholding the exclusion of evidence concerning "a different rider"). And it was consistent with the Attorney Examiner's previous holding in this case that "this proceeding is limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019." Entry ¶ 33, *In re OVEC Generation Purchase Rider Audits Required by R.C. 4928.148*, Case No. 21-477-EL-RDR (July 7, 2023) (emphasis added).

B. There Was No Equivalence Between the Auditor's Discussion of Specific OVEC Cost Categories in Former Audits and Mr. Seryak's Improper Attempt to Import the Commission's Rationale for Approving the PPA Rider.

OMAEG (at 18) makes another double standard argument concerning the audit report, claiming that it was unfair to strike Mr. Seryak's testimony about the former OVEC Riders when the Audit Report used language that was similar to language in previous audit reports and discussed, to a limited extent, some of the findings and recommendations in previous audit reports. Again, however, OMAEG has set up a false dichotomy.

The Auditor's discussion of previous audits was focused entirely on *specific categories of OVEC costs*. For example, as OMAEG notes (at 18), the 2020 audit report discussed the Auditor's recommendations in previous OVEC audit reports concerning specific cost categories, such as recommendations concerning OVEC's "must-run" commitment, "coal inventories," "capital expenses," and "the baffle wall at Clifty Creek 6." Staff Ex. 2 (Audit Report) at 11. If Mr. Seryak had stuck to these specific categories of OVEC costs, his testimony may not have been stricken. Indeed, Mr. Seryak's entire section on the "must-run" commitment was left intact, including his reference to "[p]revious OVEC prudency audits" in that section. *See* OMAEG Ex. 1 (Seryak Testimony) at 22. OMAEG argues (at 20) that its "expert" should be permitted to "referenc[e] relevant information submitted in another Commission proceeding, including an OVEC-related proceeding." But Mr. Seryak *was* allowed to reference material from previous proceedings to the extent it related to *specific categories of OVEC costs* such as the must-run commitment.

Where Mr. Seryak went too far – and his testimony was properly stricken – was his attempt to incorporate former, now-replaced *rationale and reasoning* from the Commission's decisions *approving* the prior OVEC riders and setting forth the standard by which costs under those riders would be reviewed. What Commissioner Haque said about *why he approved* the

PPA Rider has no bearing on OVEC's 2020 "must-run" commitments, "coal inventories," "capital expenses," or "the baffle wall at Clifty Creek 6." Staff Ex. 2 (Audit Report) at 11. Mr. Seryak's attempt to rely on former, replaced standards from the PPA Rider, therefore, was unconnected to the statutory question in this hearing: "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource" during the 2020 audit year. R.C. 4928.148(A)(1). The Attorney Examiner's decision to strike the irrelevant portions of Mr. Seryak's testimony was entirely proper.

C. The Statutory Words "Those Costs" Do Not Change the Fact that Mr. Seryak's Testimony Was Inflammatory and Irrelevant, and in Any Event OMAEG Can Make This Argument in Its Briefs.

OMAEG (at 20) misapprehends the phrase "those costs"[3] in R.C. 4928.148(A), arguing that these words somehow gave OMAEG's witness license to delve into detail about the Commission's former rationale and reasoning for the now-replaced PPA Rider. The statute reads as follows:

> On January 1, 2020, 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 a legacy generation resource shall be replaced by a nonbypassable rate mechanism established by the commission for recovery of those costs through December 31, 2030, from customers of all electric distribution utilities in this state.

R.C. 4928.148(A). Nothing in this statute can be read to import the former rationale or reasoning behind the PPA Rider to this proceeding. The words "those costs" are not referring to any expectation, explanation, or justification the Commission may have had for originally approving the PPA Rider.

[3] OMEAG's Memorandum repeatedly puts the words "those same costs" in quotation marks. In fact, as shown here, the word "same" does not appear in the statute. The statutory language is "those costs."

Rather, "those costs" in the above-quoted passage plainly refers back to the phrase "prudently incurred costs related to a legacy generation resource" – recovery of "those costs" simply refers to "prudently incurred costs related to a legacy generation resource" which itself is defined in the new legislation that created R.C. 4928.148. In particular, R.C. 4928.01(A)(42) defines the phrase "prudently incurred costs related to a legacy generation resource" as meaning "costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource, less any revenues realized from offering the contractual commitment for the power agreement into the wholesale markets, provided that where the net revenues exceed net costs, those excess revenues shall be credited to customers." Nothing in the statutory definition of "prudently incurred costs related to a legacy generation resource" references or incorporates prior Commission precedent regarding the predecessor riders or the Commission's general precedent on prudence.

Ultimately, of course, this argument – parsing the statutory words "those costs" – is a legal argument that OMAEG can make in its post-hearing briefs and it should not make in expert testimony. Mr. Seryak is not a lawyer and was not offering a legal opinion in his testimony, and no part of Mr. Seryak's testimony (stricken or otherwise) was necessary for OMAEG to pursue its idiosyncratic reading of "those costs" on brief. In any event, whatever those words mean (they certainly do not mean what OMAEG claims), they do not undercut the Attorney Examiner's decision to strike Mr. Seryak's attempt to confuse this proceeding with inflammatory, irrelevant testimony and inapplicable, now-replaced rationale and reasoning from a former decision on a different rider.

III. OMAEG's Procedural Complaints Are Meritless.

Among its other claims, OMAEG's appeal raises several points of procedural" sour grapes." OMAEG seems to be implying that the Attorney Examiner's ruling was somehow

improper when, in reality, the ruling was entirely by-the-book and consistent with longstanding Commission practice. OMAEG's procedural complaints should be dismissed out of hand.

First, OMAEG (at 7) complains that the decision striking Mr. Seryak's testimony was an "oral ruling," and OMAEG asserts that this somehow violates R.C. 4903.09. It is a longstanding, well-established practice for Attorney Examiners to decide on motions to strike testimony through oral rulings at the time the witness appears at the hearing. OMAEG has participated in dozens (if not hundreds) of Commission cases in which this practice has been followed, and OMAEG, OCC, and other intervening parties have made numerous oral motions to strike (and expected immediate oral rulings). That happened in this very hearing, where an oral motion and oral ruling struck a portion of AEP Ohio's witness's testimony. (*See* Tr. IV at 982.) The same reasoning applies to OMAEG's argument regarding R.C. 4903.09. Is OMAEG asserting that every oral evidentiary ruling by an Attorney Examiner violates R.C. 4903.09? Surely not. The grounds for striking the testimony were fully recorded in the transcript of the hearing, plainly satisfying the requirement that "a complete record of the proceedings be made" and that the Commission state "the reasons prompting the decisions arrived at." R.C. 4903.09. In any event, as noted above, OMAEG is free to raise all its arguments in its post-hearing brief, and the Commission will have an opportunity to enter a written decision on those arguments in its Opinion and Order – in compliance with R.C. 4903.09.

Second, OAMEG (at 17) even complains about the timing of the ruling striking Mr. Seryak's testimony, arguing that it was done at the "eleventh hour." There are several things wrong with this claim. As an initial matter, as noted above, the Attorney Examiners followed the longstanding, well-established precedent at the Commission of deciding motions to strike when the witness is called to the stand. There was nothing improper about that. Moreover, OMAEG

in an email on October 23, 2023 at 2:13pm itself requested the day on which its witness would testimony, asking to hold the fifth day of the hearing (Monday, November 6, 2023) as a "date certain" due to Mr. Seyak's travel schedule. OMAEG has only itself to blame for any ill-effects of this timing and it should be estopped from alleging an error in this regard. OMAEG (at 7) also complains that the Utilities filed the motion to strike on the "even of the hearing," but this provided OMAEG far more time to respond to the Utilities' motion to strike than the Utilities had to respond to OMAEG's and the other intervenor's motions to strike; there was no procedural deadline for motions to strike in this case and there was nothing untimely about the Utilities' motion. OCC and OMAEG (and other intervenors) moved to strike portions of the Utilities' witnesses' testimony orally while the witnesses were sitting on the stand, requiring the Utilities counsel to respond immediately to arguments he or she had just heard. By contrast, the Utilities filed the motion to strike Mr. Seryak's testimony on October 30, 2023, which was a *full week* before Mr. Seryak took the stand on November 6, 2023. OMAEG could have filed a written response to the motion to strike at any point in the week between October 30 and November 6, but OMAEG declined to do so, and once again OMAEG has only itself to blame for this failure. At the very least, OMAEG had a full week to consider the Utilities' arguments and prepare a response. How this timing "prejudiced" OMAEG is impossible to fathom.

Third, and finally, OMAEG (at 7) complains that the Attorney Examiners "did not recess to consider OMAEG's arguments" but rather ruled on the motion to strike "[i]mmediately upon the conclusion of OMAEG's response to the motion, without consideration or deliberation." This borderline-*ad-hominem* attack on the Attorney Examiners is uncalled for and easily dismissed. The reason the Attorney Examiners ruled immediately upon the conclusion of OMAEG's response is that despite having a full week to prepare, OMAEG's did not put forward

a response that merited any deliberation. The stricken portions of Mr. Seryak's testimony were unquestionably inflammatory and beyond the scope of the specific 2020 audit cost at issue in this proceeding, and OMAEG's arguments could not change that fact. Moreover, OMAEG should not have been surprised by the ruling, given that the Attorney Examiners had already clearly held – three months before Mr. Seryak's testimony was filed and four months before he took the stand – that "this proceeding is limited to reviewing the prudence and reasonableness of the actions of EDUs with ownership interests in OVEC during calendar year 2020, rather than the events leading up to the creation and implementation of the LGR mechanism that occurred in 2019." Entry ¶ 33, *In re OVEC Generation Purchase Rider Audits Required by R.C. 4928.148*, Case No. 21-477-EL-RDR (July 7, 2023) (emphasis added). Based on this ruling, OMAEG knew (or should have known) that Mr. Seryak's attempts to shoehorn the H.B. 6 investigation and PPA Rider rationale into this proceeding were flawed. The Attorney Examiners did nothing wrong, but simply reinforced their prior ruling that already established the scope of the case. OMAEG suffered no prejudice beyond the entirely proper "prejudice" that any party suffers when it attempts to confuse and muddy the issues of a proceeding through inflammatory and irrelevant testimony.

IV. CONCLUSION

For the foregoing reasons, OMAEG's interlocutory appeal should be dismissed under OAC 4901-1-15 or denied.

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 *Ohio Power Company's Memorandum in Opposition* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 20th day of November 2023, via e-mail.

/s/ Steven T. Nourse

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Summary: Memorandum OHIO POWER COMPANY'S MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL AND APPLICATION FOR REVIEW OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.