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, and AEP Ohio.	:	Case No. 21-477-EL-RDR

DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP INTERLOCUTORY APPEAL AND APPLICATION FOR REVIEW

Now comes Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), pursuant to Ohio Administrative Code (O.A.C.) 4901-1-15(D), and opposes the Motion for Interlocutory Appeal, Request for Certification to the Commissioners of the Public Utilities' Commission of Ohio (the Commission), and Application for Review filed by the Ohio Manufacturers' Association – Energy Group (OMAEG). Prior to the first day of the hearing in the underlying matter, Duke Energy Ohio, Inc. (Duke Energy Ohio), the Ohio Power Company (AEP Ohio), and the Dayton Power and Light Company (AES Ohio) (collectively, the EDUs) filed a motion to strike certain portions of the testimony of OMAEG witness John Seryak. The EDUs argued that certain portions of Mr. Seryak's direct pre-filed testimony should be struck, particularly the portions of his testimony concerning the H.B. 6 investigation and the Commission's rationale in approving AEP Ohio's now-replaced PPA Rider. The EDUs argued, and the Attorney Examiners agreed, that portions of Mr. Seryak's testimony were inflammatory and not relevant to the reasonableness and prudence of the EDUs' actions with regarding the Ohio Valley Electric Corporation (OVEC) for the 2020 audit year.

For the reasons further detailed below, OMAEG's Interlocutory Appeal is improper, unsupported, and should fail.

I. INTRODUCTION

In its Interlocutory Appeal, OMAEG argues that it was harmed and prejudiced where it was prevented from presenting testimony on behalf of its expert, John Seryak, regarding topics well outside the stated purpose and scope of the underlying proceeding: to conduct an "audit of the legacy generation resources costs of Duke Energy Ohio, Inc., The Dayton Power and Light Company, and Ohio Power Company for the period from January 1, 2020 through December 31, 2020."[1] In reality, OMAEG's Interlocutory Appeal must fail for three reasons. First, OMAEG is not entitled to an immediate interlocutory appeal pursuant to O.A.C. 4901-1-15(A)—as OMAEG has not had its participation in the underlying matter "effectively terminated." On the contrary—OMAEG's participation in the underlying proceeding as been extensive, exhaustive, and voluminous. Second, OMAEG has not satisfied the grounds for certification of its appeal under O.A.C. 4901-1-15(B), as its disagreement with the Attorney Examiners' evidentiary decisions do not represent a departure from past precedent and an immediate determination is decidedly not required to prevent prejudice. Third and finally, on the merits of the evidentiary decisions made at hearing, the Attorney Examiners correctly found and properly supported their decision to strike certain portions of Mr. Seryak's testimony as being outside the scope of this case, prejudicial, and irrelevant to the decisions before the Commission in this docket. Mr. Seryak's pre-filed direct testimony attempted to offer opinions regarding both the enactment of and investigations regarding House Bill 6 (H.B. 6) and previous Commission decisions regarding charges collected by different rider mechanisms than those which are the subject of this proceeding. Finding such testimony outside the scope, irrelevant, and prejudicial in response to the EDUs' motion to strike was

[1] *In re OVEC Generation Purchase Rider Audits Required by R.C. 4928.148*, Entry ¶ 33, Case No. 21-477-EL-RDR (July 7, 2023).

appropriate, consistent with other rulings that had already taken place in the underlying case and cases prior, and well within the Attorney Examiners duties and responsibility in this hearing.

Through its Appeal, OMAEG fails to demonstrate that its participation in the underlying case was terminated, fails to meet any prong of those required for certification of an interlocutory appeal to the Commission, and fails to demonstrate prejudice sufficient to justify overturning the Attorney Examiner's reasoned findings in the underlying matter.[2] The Attorney Examiners are tasked at hearing with determining what information will be relevant, useful, or prejudicial to the Commission's decision in this case, and to the record. Moreover, the striking of Mr. Seryak's testimony was measured, pointed, and related only to testimony well outside the parameters of the objective of the underlying proceeding. This ruling is not a departure from past Commission precedent and aligns with other scope rulings that took place during the hearing in this matter. The Attorney Examiner's evidentiary findings as it relates to Mr. Seryak's testimony were proper and well-supported and should not be overturned.

II. LAW AND ARGUMENT

A. Applicable Standard

Pursuant to O.A.C. 4901-1-15(C), "[a]ny party wishing to take an interlocutory appeal from any ruling must file the interlocutory appeal with the commission within five days after the ruling is issued" setting "forth the basis of the appeal and citations of any authorities relied upon." Such appeal must also "describe the ruling with reasonable particularity."[3]

Pursuant to O.A.C. 4901-1-15, two methods for interlocutory appeal are available. Under Section (A), a party may bring an "immediate interlocutory appeal" if the challenged order: (1) grants a motion to compel discovery or denies a motion for a protective order, (2) denies a motion

[2] O.A.C. 4901-1-15(B).
[3] O.A.C. 4901-1-15(C).

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.[4] Should an order or action of the Commission not perform any of the tasks identified in subpart (A), subpart (B) applies. Pursuant to Rule 4901-1-15(B), the Commission will review an attorney examiner's ruling only if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.[5] The standard applicable to certifying an appeal is a finding that "the appeal presents a new or novel question or 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."[6] Upon consideration of an appeal, the Commission may affirm, reverse, or modify the ruling or dismiss the appeal.[7]

Here, the Commission must dismiss the appeal taken by OMAEG. The striking of irrelevant, out of scope, prejudicial testimony on behalf of OMAEG does not present a new or novel question, is not a departure from past precedent, and does not represent undue prejudice to OMAEG. Moreover, OMAEG is not entitled to an immediate interlocutory appeal under subpart (A), because the Commission did not "terminate" OMAEG's right to participate in the underlying proceeding.

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[4] OAC 4901-1-15(A)(1)-(4).
[5] O.A.C. 4901-1-15(B).
[6] *Id.*
[7] O.A.C. 4901-1-15(E).

B. OMAEG's Right to Participate in the Underlying Proceeding Was Not "Terminated" as it Claims, and OMAEG Fails to Demonstrate an Immediate Appeal is Proper Under O.A.C. 4901-1-15(A).

OMAEG argues that it is entitled to an immediate interlocutory appeal of the Attorney Examiners' decision regarding Mr. Seryak's testimony pursuant to O.A.C. 4901-1-15(A)(2) because the decision "effectively terminated" OMAEG's right to participate in the underlying proceeding.[8] This argument is a strained reading of 4901-1-15(A)(2) and is without merit.

As all parties present at the hearing can attest, and as the hearing transcript volumes demonstrate, OMAEG's right to participate in this proceeding was not terminated, abridged, or impeded. The Attorney Examiners' decision to strike particularized portions of Mr. Seryak's testimony did not "terminate" its rights any more than the striking of other parties' pre-filed direct testimony did the same for their right to participate. OMAEG was granted wide latitude to cross examine the Auditor for nearly a dozen hours and all EDU witnesses for as long as it preferred. And OMAEG made its own motions to strike (orally) nearly every EDU witness, one of which covered all of witness Swez's pre-filed direct testimony in full. OMAEG's participation in the underlying docket thus far can only be described as maximum. Moreover, OMAEG will be permitted to file initial and reply briefs, where it can raise all of the arguments it raises in the its interlocutory appeal once again. And again on rehearing, appeal, and beyond. Nearly unlimited bites at the apple will be available to OMAEG in arguing its case. None of the rights that OMAEG retains to participate in this case are contemplated by 4901-1-15(A)(2), which speaks instead to a party being *discontinued* from participation in a case, *i.e.* not allowed representation, briefing, witnesses, appeals, or the like.

[8] *See, e.g.*, OMAEG Interlocutory Appeal at 8, 14, 15.

Additionally, Mr. Seryak's testimony was not stricken in full. Far from it. Mr. Seryak was permitted to testify on all *relevant* portions of his testimony, as defined by the Attorney Examiners in their reasoned ruling. This includes Mr. Seryak's arguments related to the Inter-Company Power Agreement (ICPA) and its relation to the LGR statute, the commitment status of the OVEC plans during the audit period, fuel costs during the audit period, and the like. OMAEG retained full ability to address the issues *germane to the underlying case*, and its right to participate was clearly not "terminated," as would be required for it to succeed on its appeal pursuant to O.A.C. 4901-1-15(A)(2). An immediate appeal is not required to allow OMAEG to participate in a proceeding in which it has been vigorously participating for years now. And unlike OMAEG's verbiage, the standard here is "termination" or "ending" of a party's right to participate. Not "effectively terminated" as OMAEG indicates in its Memorandum in Support.[9]

The Attorney Examiners' evidentiary ruling should appropriately be addressed by OMAEG in its post-hearing briefing—there are no circumstances where the ruling on Mr. Seryak's stricken testimony has "terminated" OMAEG's right to participate in the underlying docket.

C. OMAEG Fails to Demonstrate that Certification of its Appeal Under O.A.C. 4901-1-15(B) is Warranted.

Because OMAEG cannot satisfy the requirements of O.A.C. 4901-1-15(A), it must seek to certify its interlocutory appeal pursuant to O.A.C. 4901-1-15(B). Under Rule 4901-1-15(B), the Commission will review an attorney examiner's ruling only if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.[10] The standard applicable to certifying an appeal is a finding 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

[9] *Id.* at 15.
[10] O.A.C. 4901-1-15(B).

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."[11] Upon consideration of an appeal, the Commission may affirm, reverse, or modify the ruling or dismiss the appeal.[12] Here, the Commission must dismiss the appeal as it fails to satisfy the standard for consideration under Section (B).

Regarding the first prong of O.A.C. 4901-1-15(B), OMAEG argues that the Attorney Examiners departed from past precedent in striking from Mr. Seryak's inflammatory and extraneous testimony.[13] On this point, OMAEG is mistaken. The Attorney Examiners' rulings regarding Mr. Seryak's testimony are consistent with rulings in the underlying case, as well as past precedent in prior dockets considering OVEC-related audits. For example, regarding testimony offered by Perez in the underlying matter, the Attorney Examiners also struck testimony during the course of the hearing from Office of the Ohio Consumers' Counsel (OCC) witness Perez regarding references to irrelevant emails, communications, and the audit report from AEP Ohio's PPA Rider, Case No. 18-1004-EL-RDR, holding that such testimony was beyond the scope of the proceeding. Likewise, by ruling in partial favor of a motion to quash a subpoena by OCC in the underlying case, the Attorney Examiner partially quashed the subpoena, finding 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."[14]

Moreover, past precedent, outside the underlying docket, is consistent with the Attorney Examiners' ruling in this case and is not indicative of a departure. In the 2019 audit of Duke

[11] O.A.C. 4901-1-15(E).
[12] O.A.C. 4901-1-15(B) (emphasis added).
[13] OMAEG Interlocutory Appeal at 13.
[14] July 7, 2023 Entry ¶ 33.

Energy Ohio's Rider PSR, the Commission upheld a similar decision by Attorney Examiner, striking certain testimony that related to "a different rider, and a different EDU," AEP Ohio's PPA Audit.[15] The Commission determined as follows: "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 [in AEP Ohio's PPA Audit], and [OCC's expert's] testimony related to that report, lack relevance in this proceeding . . . [a]s explained by the attorney examiner, the purpose of this proceeding is not to relitigate another EDU's rider.[16] Given the scope limiting rulings in this docket and others, there is no "departure from past precedent" under the first prong of OAC 4901-1-15(B) in this case. Rather, the Attorney Examiners' evidentiary rulings represent a continued application of a well-established rule in this proceeding.

Regarding the second requirement of O.A.C. 4901-1-15(B), OMAEG likewise fails to establish by its Memorandum in Support that "an immediate determination by the [C]omission is needed to prevent the likelihood of undue prejudice or expense, should the [C]omission ultimately reverse the ruling in question." OMAEG will not suffer "undue prejudice" if the Commission ultimately adopts OMAEG's evidentiary arguments regarding Mr. Seryak's testimony. OMAEG retains the right to challenge the Attorney Examiners' evidentiary findings in its post-hearing briefing, and the Commission may consider and order appropriate relief (if any) at that time. This would include disagreeing with the striking of Mr. Seryak's testimony, reversing that ruling, or otherwise. OMAEG has not suffered prejudice, nor will it, should the Commission deny certification of its interlocutory appeal.

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[15] *Id.*

[16] *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc*., Opinion and Order, Case No. 20-167-EL-RDR (September 6, 2023).

D. Even if the OMAEG's Appeal is Certified, and the Merits of its Claims are Reached, OMAEG's Appeal Should still Fail.

The Attorney Examiners in this case partially granted the EDUs' Motion to Strike certain portions of OMAEG witness Seryak's testimony. In doing so, the Attorney Examiners struck two distinct categories of testimony, both of which were improper for consideration in the underlying matter. The first type of testimony related to Mr. Seryak's lengthy testimony on the topic of H.B. 6 and federal investigations into the same. This information covered nearly four pages of Mr. Seryak's testimony and contained Mr. Seryak's musings and opinions regarding H.B. 6. The second type of testimony struck from Mr. Seryak's pre-filed direct was that addressing the Commission's rationale for approving prior OVEC-related riders, which are no longer in effect. The Attorney Examiners found that neither of these types of testimony were sufficiently related to the question at the heart of this proceeding, as dictated by R.C. 4928.148(A)(1). These irrelevant, confusing, and inflammatory portions of Mr. Seryak's testimony were properly stricken from the record in this case. For the reasons further highlighted below, the Attorney Examiners' decision on this topic was reasoned and supported.

1. Contrary to OMAEG's Claims, the Auditor and EDUs did not Testify Regarding Matters Covered by Mr. Seryak's Stricken Testimony.

OMAEG claims that the Attorney Examiners' decision should be overturned for what OMAEG believes is inconsistency between treatment of testimony regarding prior OVEC riders by the Auditor and EDUs, and that of Mr. Seryak. OMAEG also argues that the Auditor's mere acknowledgement of the existence of H.B. 6 opens the door to Mr. Seryak's extensive testimony regarding investigations of the same. Both of these arguments are without merit and do not demonstrate that OMAEG should succeed regarding its interlocutory appeal.

a. Seryak's H.B. 6-related testimony goes well beyond any mere reference to the law by the Auditor.

To start, Mr. Seryak's stricken testimony regarding H.B. 6 went well beyond the Auditor's mere acknowledgement of the existence of H.B. 6. OMAEG makes much of H.B. 6 being mentioned in single footnote in the audit reports in this case, as well as the Auditor's factual statements that: "[a]s noted previously, in 2019 HB 6 defined a legacy generation resource in a way which encompassed the OVEC plants" thus replacing the prior OVEC riders.[17] According to OMAEG, these limited, factual acknowledgments regarding the mere existence of H.B. 6 amounted to the Auditor "discuss[ing] HB 6 in multiple places throughout all three Audit Reports" and (according to OMAEG) H.B. 6 was discussed "*at length* in the Audit Reports."[18] This is simply not the case. From these unannotated references to H.B. 6, OMAEG took the opportunity in Mr. Seryak's stricken testimony to present approximately four pages of testimony regarding "open federal investigations," responding to salacious questions such as "Is there any indication that OVEC sponsors or supporters could be part of the HB6 investigation?" and "Is there any indication that the former Chairman of the Commission could be investigated for HB6-related matters?"

Neither the Auditor nor any Utility witness discussed the H.B. 6 allegations, investigations, or claims, or in any way linked those investigations to the prudence of the Utilities' 2020 OVEC costs. This approach was Mr. Seryak's alone. OMAEG's arguments attempting to conflate the Auditor's factual statements regarding H.B. 6 with those set forth in Seryak's stricken testimony

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[17] Duke Energy Ohio Audit Report, Section 4.1.2 at 23. *See also* Duke Energy Ohio Audit Report at 14 ("The most recent legislation authorizing cost recovery with respect to changes under the ICPA arrangement (HB 6) requires that the cost to residential customers cannot exceed $1.50/month.); *id.* at 7 ("In 2019, House Bill 6 ("HB 6") defined a legacy generation resource ("LGR") in a way which encompassed the OVEC plants (RC 4928.01(A)(41)). New riders were needed to replace existing OVEC riders, starting on January 1, 2020.").

[18] OMAEG Interlocutory Appeal at 2.

represent a false equivalence and should not be given weight. The Attorney Examiners rightfully struck this portion of Mr. Seryak's testimony as beyond the scope of the underlying proceeding, irrelevant, and meant to obfuscate the purpose of the LGR Audit itself, as discussed above.

b. <u>There is no equivalence between Seryak's testimony regarding former OVEC riders and the mention of such riders by the Auditor.</u>

Regarding Mr. Seryak's testimony related to former OVEC riders, there is again no equivalence between EDU or Auditor testimony mentioning this topic and Mr. Seryak's testimony. Mr. Seryak quotes at length, for example, from the Commission order approving AEP Ohio's former PPA Rider, even attempting to apply the Commission's prior reasoning for approving the PPA Rider to evaluate the prudence of LGR Rider costs. 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 are not applicable in this case. None of the EDU 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 to the one at hand.

Likewise, OMAEG's argument that the Auditor mentioned previous, specific categories of OVEC costs, in previous riders, and therefore Mr. Seryak should be allowed to bring any information OMAEG so chooses to the underlying proceeding is without merit. OMAEG claims that the "Commission's prior decisions informed OMAEG's expert's regulatory analysis and expert opinion as to what constitutes prudent costs and "reasonableness" in the context of the LGR Riders during the Audit Period[.]"[19] OMAEG argues that Mr. Seryak should be permitted to reference and rely upon "relevant information submitted in another Commission proceeding,

[19] OMAEG Interlocutory Appeal at 20.

including an OVEC-related proceeding."[20] OMAEG conflates "relevant information submitted in another Commission proceeding,"[21] however, with what Mr. Seryak's testimony really attempted to do—incorporate rationale and reasoning from the Commission's decisions approving the prior OVEC riders, and conflate the two standards by which costs are to be reviewed under the current riders and the former.[22] Mr. Seryak's attempt to rely upon replaced standards, reasoning, and dicta is 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.[23] This type of testimony was *not* present in other EDU witness testimony or Auditor testimony, and there is nothing for Mr. Seryak to "respond to" on this topic. It was entirely within the Attorney Examiner's purview to strike this type of testimony and doing so was appropriate and supported.

Finally, OMAEG argues in its Memorandum in Support that Mr. Seryak's testimony should not be stricken because R.C. 4928.148(A) references "those costs," which are, in OMAEG's interpretation, costs associated with or described by prior OVEC riders. This tortured reading of 4928.148(A), made at hearing also by OMAEG in arguing the Motion to Strike, is not supported by a simple review of the language and should not be used to overturn the Attorney Examiners' reasoned rulings regarding Mr. Seryak's testimony.

Regarding R.C. 4928.148(A), the relevant language reads as follows: "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

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[20] *Id.*
[21] *Id.*
[22] *See, e.g.*, Mr. Seryak's attempt to bring in testimony related to Commissioner Haque's concurrence in approving AEP Ohio's former, now discontinued PPA Rider.
[23] R.C. 4928.148(A)(1).

nonbypassable rate mechanism established by the commission for recovery of those costs . . . from customers of all electric distribution utilities in this state." OMAEG argues that the phrase "those costs" reads the former rationale supporting AEP Ohio's PPA Rider into the statute, and likewise the discussion of the same into Mr. Seryak's testimony. While Duke Energy Ohio would vigorously argue (on brief, as is the appropriate place for such argument) that "those costs" in R.C. 4928.148(A) refers only to the phrase "prudently incurred costs related to a legacy generation resource," as defined in R.C. 4928.01(A)(42), ultimately this argument is a strictly legal one, not appropriate for non-lawyer expert testimony—or expert testimony at all. Striking Mr. Seryak's testimony regarding the former OVEC-related riders as outside the scope of the underlying proceeding should not be overturned by OMAEG's strictly legal argument related to "those costs" and the meaning of that language in the statute. OMAEG can argue as much on brief, should it like, but Mr. Seryak should not be permitted to introduce irrelevant information or conflate these separate, distinct OVEC audits with his expert testimony. OMAEG, by its appeal, has failed to show otherwise, and the amount of mental gymnastics necessary to adopt its arguments on this point demonstrate as much.

2. <u>OMAEG's Complaints Regarding the Procedural Aspects of the Attorney Examiners' Decision, and this Proceeding, are Without Merit.</u>

In its Appeal, OMAEG raises a number of complaints about the procedural aspects of the hearing and the specific timing and consideration of the Attorney Examiners' decision on the EDUs' Motion to Strike Mr. Seryak's testimony.

For example, on page 6 of its Appeal, OMAEG states that "[a]fter four days of hearing, including multiple days of approximately nine to ten hours of testimony each day, OMAEG was permitted to respond to the Utilities' Motion to Strike on the last day of hearing before the last witness was allowed to testify." OMAEG implies that there was some motive on the part of the

Attorney Examiners or EDUs regarding the timing of Mr. Seryak's testimony and the consideration of the EDUs' Motion to Strike. This is simply not the case. It must first be clarified that the "nine to ten hours of testimony each day" was in fact cross examination of the Auditor and EDU witnesses—not some decision by the EDUs or Staff to keep those parties on the stand for hours on end each day. Likewise, OMAEG agreed with OCC to have witness Seryak be the last witness in the weeklong hearing proceeding, and indeed did not make Mr. Seryak available for cross examination at all until the very last day of hearing, as a date certain witness due to his own travel schedule. Moreover, all motions to strike pertaining to particular witness testimony throughout the entire hearing were taken *as those witnesses took the stand*. OMAEG knew its witness would appear last (as was its preference) and already had the motion regarding Mr. Seryak's testimony in hand for seven days at the time Mr. Seryak finally took the stand. Yet, OMAEG argues that "[b]y filing a fourteen-page Motion to Strike on the eve of the hearing, the Utilities effectively prevented OMAEG from providing a written response that would be considered simultaneously with the Utilities' arguments."[24] However, the seven days afforded OMAEG to respond to the EDUs' arguments was more than enough time to prepare its opposition, and more than most parties ever receive.[25] Contrast this with OMAEG's oral motion to strike Duke Energy Ohio's witness Swez's testimony, which was argued by OMAEG, not in a pre-filed manner, but by OMAEG reading an equivalently detailed motion orally into the record and forcing counsel to respond on the spot. No responding parties complained about that fact or argued procedural impropriety, however. Moreover, OMAEG could have easily filed a written response

[24] OMAEG Interlocutory Appeal at 7.

[25] As an example, in the 2019 Duke Energy Ohio PSR Audit, Case No. 20-167-EL-RDR, Duke Energy Ohio filed a similar Motion to Strike that covered portions of Mr. Seryak's pre-filed testimony in that case, and did so on the day before the hearing, May 24, 2022. *See* Duke Energy Ohio, Inc.'s Motion to Strike Specific Intervenor Pre-Filed Testimony and Memorandum in Support (May 24, 2022). In that instance, OMAEG filed a written, 34-page memorandum contra Duke Energy Ohio's Motion to Strike on May 27, 2022, just three days later. OMAEG had more than twice that amount of time to file a written response in this case but chose not to.

to the motion to strike Mr. Seryak's testimony at any point in the week between October 30th and November 6th. In fact OMAEG did read into the record a lengthy written response at the time it was called upon to respond to the Motion to Strike. OMAEG declining to file a formal written response and then claiming some sort of prejudice as a result is a baffling approach to this argument. The timing associated with the EDUs' Motion to Strike certainly did not prejudice OMAEG.

OMAEG goes on to complain that the Attorney Examiners' decision regarding Mr. Seryak's testimony was deficient in some way because it was offered orally on the record and therefore did not offer sufficient reasoning in violation of R.C. 4903.09, arguing that "[e]ven more egregious, the Attorney Examiners ignored the requirements of R.C. 4903.09 by failing to set forth their reasons for granting the Utilities' Motion to Strike."[26] This argument is likewise without merit. 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 a huge number of proceedings before the Commission. This practice is commonplace. Moreover, as discussed above, OMAEG made its own oral motions to strike *in this very proceeding* and for every EDU witness and received its own oral rulings on those motions. And 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. There is nothing prejudicial about this practice, and OMAEG's assertions to the contrary are without merit.

Finally, OMAEG makes another timing argument regarding the Motion to Strike Mr. Seryak's testimony, but it is one regarding the Attorney Examiners' approach to delivering their

[26] OMAEG Interlocutory Appeal at 7.

ruling. OMAEG argues that the Attorney Examiners did not sufficiently consider OMAEG's oral arguments because the Attorney Examiners "did not recess to consider OMAEG's arguments" and ruled on the motion to strike "[i]mmediately upon the conclusion of OMAEG's response to the motion, without consideration or deliberation."[27] OMAEG also again argues that it was prevented from filing a response to the Motion to Strike, even though it had seven days in which to do so. OMAEG may take issue with the Attorney Examiners' ability to process information from the bench, and make deliberate and timely rulings, but this is certainly not a reason to overturn their decision regarding Mr. Seryak's testimony. Despite having full warning of the arguments made in the EDUs' Motion to Strike as they were pre-filed for a week by the time OMAEG had to respond, OMAEG did not make arguments which prevented Mr. Seryak's testimony from being stricken. Nor could it. This does not demonstrate error on the part of the Attorney Examiners, however. As discussed above, OMAEG was already on notice regarding the clarifying orders on motions to strike that had taken place previously in the underlying proceeding, and in previous rulings. Nothing regarding the timing or deliberations of the Attorney Examiners in ruling on the EDUs' Motion to Strike demonstrates that that decision should be overturned.

3. The Attorneys Examiners' Decision Regarding the EDUs' Motion to Strike was Reasoned, Restrained, and Supported.

Ultimately, the Attorney Examiners provided a reasoned, restrained, and specific approach to striking portions of Mr. Seryak's testimony that were inflammatory, irrelevant, and outside the scope of the underlying proceeding. The Attorney Examiners also entertained on the spot clarifying motions and responded to OMAEG's arguments throughout their ruling on Mr. Seryak's testimony.[28] The Attorney Examiners provided reasoning, listened to counter arguments, and

[27] *Id*.
[28] *See generally* Transcript Vol. V at 1315-1323.

ultimately made a decision. The same is demonstrated by the transcript for the hearing, where the Attorney Examiners found, in part, that:

> [I]n our July 7th, 2023 Entry we acknowledged . . . this proceeding is limited to reviewing the prudence and the reasonableness of the actions of EDUs with ownership interest 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. RC 4928.148 is still the existing law under which we're operating in this proceeding. It is the Commission's role to effectuate laws passed by the General Assembly. So I agree that this goes well beyond -- in addition to the arguments raised by the Companies, I agree Mr. Seryak's testimony goes well beyond what was noted in the audit report as mere background information regarding earlier audits conducted by the Commission for riders that were not implemented pursuant to 4928.148. It is also -- to my knowledge, the U.S. Attorney has not made a similar request to stay this proceeding as it has done so in four other Commission proceedings. So, for those reasons we will be granting the motion to strike[.]"[29]

The decision to strike portions of Mr. Seryak's pre-filed direct testimony, as set forth by the Attorney Examiners, does not demonstrate a departure from past precedent (in this case or other cases), and OMAEG has not demonstrated prejudice or precedential departure necessary to succeed under O.A.C. 4901-1-15(B). Rather, Mr. Seryak's testimony went "well beyond what was noted in the audit report as mere background information regarding earlier audits conducted by the Commission for riders that were not implemented pursuant to 4928.148."[30]

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio asks that the Commission deny and/or dismiss OMAEG's interlocutory appeal. OMAEG's appeal does not qualify for consideration under O.A.C. 4901-1-15(A) and has not made the requisite showings pursuant to O.A.C. 4901-1-15(B).

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[29] *Id.* at 1313-1314.
[30] *Id.* at 1313.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra The Ohio Manufacturers' Association Energy Group Interlocutory Appeal and Application for Review electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Akhbari, Elyse Hanson and Vaysman, Larisa and Kingery, Jeanne.