

**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 ) Case No. 21-477-EL-RDR  
Dayton Power and Light Company, and AEP )  
Ohio. )

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**JOINT MEMORANDUM CONTRA  
DUKE ENERGY OHIO, THE DAYTON POWER AND LIGHT COMPANY,  
AND OHIO POWER COMPANY'S  
MOTIONS FOR PROTECTIVE ORDER  
OF  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP  
AND  
THE KROGER CO.**

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**I. INTRODUCTION**

From January 1, 2020 through December 31, 2020 (Audit Period), Duke Energy Ohio (Duke), the Dayton Power and Light Company d/b/a AES Ohio (AES), and Ohio Power Company (AEP) (collectively, the Sponsoring Companies) charged Ohioans \$105,524,869.53<sup>1</sup> to subsidize the Ohio Valley Electric Corporation's (OVEC) continued operation of a pair of 1950s-era, aging, uneconomical, dirty coal plants located in Ohio and Indiana. These substantial subsidies were

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<sup>1</sup> See AES Motion for Protective Order, Exhibit 1 at 25, Figure 9, Column "Rider revenues, LGR" (January 4, 2024) (hereinafter, Revised Public AES Audit Report); AEP Motion for Protective Order, Attachment A at 28–29, Figure 9, Column H (January 4, 2024) (hereinafter, Revised Public AEP Audit Report); Duke Motion for Protective Order, Attachment 1 at 26, Figure 9, Column K (January 4, 2024) (hereinafter, Revised Public Duke Audit Report); and Tr. Vol. I at 65, 76–78 (Cross-Examination of Fagan). The Audit Reports were entered into the record as Staff Exs. 2 and 3C (AES' public and confidential versions), 4 and 5C (AEP's public and confidential versions), and 6 and 7C (Duke's public and confidential versions).

charged to customers through the Sponsoring Companies' non-bypassable Legacy Generation Resources Riders (LGR Riders), which were created by the tainted House Bill 6 (HB 6).<sup>2</sup>

On May 5, 2021, the Public Utilities Commission of Ohio (Commission) opened the above-captioned proceeding to review the prudence and reasonableness of the incurred costs related to operating the OVEC plants that were passed on to customers through the LGR Riders during the Audit Period.<sup>3</sup> The auditor in this case filed three separate Audit Reports on December 17, 2021, all of which included heavy redactions that were requested by the Sponsoring Companies.<sup>4</sup>

During the evidentiary hearing held in this proceeding, the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Co. (Kroger), and the other intervening parties all made multiple requests to unredact portions of the Audit Reports, testimony, and other exhibits that should be made public for the sake of transparency of the audits and costs because the OVEC subsidies were being paid for by customers.<sup>5</sup> Additionally, OMAEG, Kroger, and others sought to make much of the information public under the Commission's rules given that the information was already in the public domain, as well as for consistency purposes since the same information was publicly available elsewhere.<sup>6</sup>

Subsequent to the conclusion of the hearing, on December 22, 2023, the Attorney Examiners issued an Entry pursuant to Ohio Adm.Code 4901-1-24(D), directing the Sponsoring Companies to reexamine and reassess the redacted information contained in the confidential

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<sup>2</sup> R.C. 4928.148(A). See Staff Ex. 2, Public AES Audit Report at 10–11, 23, 29–30; Staff Ex. 4, Public AEP Audit Report at 7, 10–11, 17, 25, 35, 110; and Staff Ex. 6, Public Duke Audit Report at 7, 11, 31–33, 112.

<sup>3</sup> Entry and Request for Proposal No. RA21-PPA-1 at 1 (May 5, 2021).

<sup>4</sup> Tr. Vol. I at 118 (Cross-Examination of Fagan).

<sup>5</sup> See Tr. Vol. I at 45, 67–72; Tr. Vol. II at 367–68; 399–402, 442–43, 554–59; Tr. Vol. III at 554–55; Tr. Vol. IV at 926–27; and Tr. Vol. V at 1370–71.

<sup>6</sup> *Id.*

versions of the Audit Reports and then file new motions for protective order by December 29, 2023.<sup>7</sup> As stated in the Entry, “[a]ny information that is currently subject to [existing] protective order[s] in this case but is not identified by the moving parties will be considered by the Commission as no longer subject to the protective order and will be released to the public record at that time.”<sup>8</sup> The Sponsoring Companies were directed to “identify, by page number, any information currently subject to the protective order in the above-captioned case that they believe should remain subject to the protective order by the Commission, as well as explain why that redacted information should continue to be held as protected by the Commission.”<sup>9</sup> Parties wishing to file a responsive pleading were given three days to do so.<sup>10</sup>

As directed by the Commission, the Sponsoring Companies each filed new motions for protective order on January 4, 2024. Attached to these motions were new redacted versions of the Sponsoring Companies’ respective Audit Reports,<sup>11</sup> as well as new redacted versions of Staff Ex. 8 C, which was Commission Staff’s supplement to the Audit Report (Audit Report Supplements).<sup>12</sup>

In accordance with the Commission’s directive in its December 22, 2023 Entry, and after reviewing the Audit Reports and Audit Report Supplements filed by the Sponsoring Companies, OMAEG and Kroger hereby file this Joint Memorandum Contra the Sponsoring Companies’ Motions for Protective Order requesting that the Commission issue an order requiring the

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<sup>7</sup> Entry at ¶ 15 (December 22, 2023). This filing deadline was later extended to January 4, 2023 by a subsequent Entry issued on December 27, 2023.

<sup>8</sup> Entry at ¶ 15 (December 22, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Revised Public AES Audit Report (Staff Ex.2); Revised Public AEP Audit Report (Staff Ex. 4); Revised Public Duke Audit Report (Staff Ex 6).

<sup>12</sup> See AES Motion for Protective Order, Exhibit 2 (hereinafter, Public AES Audit Report Supplement); AEP Motion for Protective Order, Attachment B (hereinafter, Public AEP Audit Report Supplement); Duke Motion for Protective Order, Attachment 2 (hereinafter, Public Duke Audit Report Supplement).

Sponsoring Companies to unredact additional portions of the Audit Report for the sake of transparency and consistency.<sup>13</sup>

## II. ARGUMENT

### A. The Sponsoring Companies should unredact additional information in their respective Audit Reports for the sake of transparency and consistency.

In order to ensure the full and proper disposition of this case, as well as transparency for the public, the Commission should order the Sponsoring Companies to unredact additional information in the Audit Reports that is already available in the public domain, specifically the following:

<u>Company</u>	<u>Information</u>	<u>Reason for Publication in Public Record</u>
AES	Staff Ex. 2 at 26, All Text	1. This information is unredacted elsewhere in AES' Audit Report and it should also be unredacted here. 2. For consistency with the other utilities' Audit Reports, this information should be unredacted as similar information is not deemed to be confidential in the other Audit Reports.
	Staff Ex. 2 at 49, Text	1. This information is unredacted elsewhere in AES' Audit Report and it should also be unredacted here.
AEP	Staff Ex. 4 at 52, Text	1. This information is unredacted elsewhere in AEP's Audit Report and it should also be unredacted here. 2. For consistency with the other utilities' Audit Reports, this information should be unredacted as the same information is not deemed to be confidential in the other Audit Reports.
	Staff Ex. 8C at 2, All Text	1. For consistency with the other utilities' Audit Report Supplements, this information should be unredacted as the same information is not deemed to be confidential in the other Audit Report Supplements.
Duke	Staff Ex. 6 at 54, Text	1. This information is unredacted elsewhere in Duke's Audit Report and it should also be unredacted here. 2. For consistency with the other utilities' Audit Reports, this information should be unredacted as the same information is not deemed to be confidential in the other Audit Reports.

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<sup>13</sup> Entry at ¶ 15 (December 22, 2023).

As noted by the Sponsoring Companies themselves, the only information that the Commission should be protecting is information that constitutes trade secret information under Ohio law, is competitively sensitive in nature, and is not otherwise publicly available. Information that is already available in the public domain should not be protected or redacted from the Audit Reports or the Audit Report Supplements. Pursuant to R.C. 1333.61(D) and Ohio Adm.Code 4901-1-24, if information is otherwise publicly available, it is not deemed to be confidential, and therefore, should not be protected or redacted.

Moreover, for the sake of consistency, all of the Sponsoring Companies should have the same information unredacted in their respective Audit Reports. Each Sponsoring Company bears its own burden of proof to demonstrate that the costs it incurred during the Audit Period related to the continued operation of the OVEC coal plants, as well as its actions, were reasonable, prudent, and in the best interests of customers. Therefore, parties in this proceeding should be able to rely on the same OVEC information across all three Audit Reports and Audit Report Supplements.

For example, all of the text on page 26 of AES' Audit Report (Staff Ex. 2) should be unredacted because the currently redacted numbers are from Figure 11, which has been deemed non-confidential and public and has been unredacted in its entirety.<sup>14</sup> Similarly, the name "Illinois Basin" should be unredacted on page 49 of AES' Audit Report (Staff Ex. 2), page 52 of AEP's Audit Report (Staff Ex. 4), and page 54 of Duke's Audit Report (Staff Ex. 6) because it is stated elsewhere in the Audit Reports that "Clifty Creek was served by variety [*sic*] of coal suppliers sourcing from the Illinois Basin" market.<sup>15</sup> When the Sponsoring Companies unredacted certain portions of their Audit Reports and Audit Report Supplements, they made all of that information

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<sup>14</sup> See Revised Public AES Audit Report at 27, Figure 11 (Staff Ex. 2).

<sup>15</sup> Revised Public AES Audit Report at 52 (Staff Ex. 2); Revised Public AEP Audit Report at 55 (Staff Ex. 4); Revised Public Duke Audit Report at 57 (Staff Ex. 6).

public and publicly available. Therefore, under R.C. 1333.61, it is deemed to be public information and not confidential. Thus, when that same information appears elsewhere in the Audit Reports or Audit Report Supplements, it should not be redacted.

Additionally, and for similar reasons, all of the text on page 2 of AEP's Audit Report Supplement (Staff Ex. 8C) should be unredacted because the redacted numbers on page 2 are publicly available elsewhere, specifically within the AES and Duke Audit Report Supplements (Staff Ex. 8C).<sup>16</sup> The sentence "OVEC characterizes its strategy with respect to Kyger Creek as a high-commitment strategy, to help cope with the lack of competition in coal suppliers" should also be entirely unredacted on page 52 of AEP's Audit Report (Staff Ex. 4) and page 54 of Duke's Audit Report (Staff Ex. 6) because that sentence was unredacted on page 49 of AES' Audit Report (Staff Ex. 2).<sup>17</sup> As noted above, each Sponsoring Company bears its own burden of proof in this case, and parties ought to be able to rely on the same information across all three Audit Reports. Therefore, given that the information is unredacted in one Audit Report or Audit Report Supplement and is publicly available, that information has been deemed to be non-confidential and should not be held confidential or be redacted in other documents.<sup>18</sup>

Moreover, for the sake of both transparency and consistency, information that is otherwise publicly available in the docket (whether through another utilities' Audit Report or an exhibit), should also be publicly available everywhere throughout the record of the case, including within all of the Audit Reports and the Audit Report Supplements, as well as testimony and exhibits.

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<sup>16</sup> Public AES Audit Report Supplement at 6 (Staff Ex. 8C); Public Duke Audit Report Supplement at 9 (Staff Ex. 8C).

<sup>17</sup> Revised Public AES Audit Report at 49 (Staff Ex. 2).

<sup>18</sup> R.C. 1333.61(D) states that "trade secret" information must (1) derive independent economic value from not being generally known/readily ascertainable by proper means, *and* (2) be subject to efforts to maintain its secrecy. *See also* Ohio Adm.Code 4901-1-24, which allows parties to seek a protective order for confidential information.

**B. All testimony and exhibits presented at the evidentiary hearing containing information that has been deemed to be public and is publicly available also should be deemed non-confidential and should be unredacted and made publicly available.**

R.C. 1333.61(D) imposes two requirements for information to be considered confidential and trade secret. First, that it derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and second that it is subject of efforts that are reasonable under the circumstances to maintain its secrecy. Consequently, information that has been released to the public or is publicly available cannot be considered confidential or a trade secret, because reasonable efforts have not been made to maintain its secrecy.

When the Sponsoring Companies unredacted certain portions of their Audit Reports and Audit Report Supplements, that information became public and is now publicly available. Therefore, under R.C. 1333.61(D), it is deemed to be public information and it should be publicly available throughout the record of the case. Thus, for the sake of additional transparency and consistency regarding what information has been deemed public, when the same public information appears elsewhere in the record, including in testimony or other exhibits, it should also be unredacted in those documents and released to the public in the record of the case. Accordingly, the Commission should require the Sponsoring Companies to review and unredact public information that is contained in testimony and exhibits and re-file those documents in the public record of this case.

**C. The Duke emails admitted in the record at the evidentiary hearing as OMAEG Ex. 9C should be deemed non-confidential in their entirety.**

The Duke emails admitted in the record at the evidentiary hearing as OMAEG Ex. 9C should be deemed non-confidential in their entirety and made part of the public record in this case. Public release of the information is required as the information does not satisfy the standard for

confidential treatment based upon Duke’s motion for protection filed in this case and the information released in the Audit Report and Audit Report Supplement as it does not satisfy R.C. 1333.61(D). Additionally, Duke has not specifically moved to protect the information contained within the emails. As noted by the December 22, 2023 Entry, “[a]ny information that is currently subject to [existing] protective order[s] in this case but is not identified by the moving parties will be considered by the Commission as no longer subject to the protective order and will be released to the public record at that time.”<sup>19</sup> Therefore, given that OMAEG Ex. 9C was not subject to Duke’s prior protective order as Duke never specifically sought protection of any of the information contained in the emails, and given that Duke did not seek protection in its recent motion for protection, this information should be released into the public record.

At a minimum, OMAEG Ex. 9C should be filed in the public docket in this case with redactions. It is OMAEG’s understanding that certain Duke emails were admitted in the record as OMAEG Ex. 9C with redactions.<sup>20</sup> However, the exhibit (the redacted emails) do not appear to be filed in the public record of the case. Therefore, at a minimum, OMAEG Ex. 9C should be made part of the public record with redactions.

### **III. CONCLUSION**

Ohioans have been subsidizing a pair of dirty, uneconomic, and imprudently run coal plans—one of which is in Indiana—for years, and in 2020 alone, the Sponsoring Companies charged Ohio ratepayer \$105,524,869.53<sup>21</sup> through their non-bypassable LGR Riders, which were created by the tainted HB 6 back in 2019. The public has a right to know what the Sponsoring

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<sup>19</sup> Entry at ¶ 15 (December 22, 2023).

<sup>20</sup> See Tr. Vol. IV at 926–27.

<sup>21</sup> See Revised Public AES Audit Report at 25, Figure 9, Column “Rider revenues, LGR” (Staff Ex. 2); Revised Public AEP Audit Report at 28–29, Figure 9, Column H (Staff Ex. 4); Revised Public Duke Audit Report at 26, Figure 9, Column K (Staff Ex. 6); and Tr. Vol. I at 65, 76–78 (Cross-Examination of Fagan).



Companies are charging them, and the parties in this case have a right to rely on publicly available information that is consistently publicly available across all three Audit Reports, three Audit Report Supplements, all testimony, and all exhibits. Therefore, for all the reasons explained above, OMAEG and Kroger respectfully request that the Commission order the Sponsoring Companies to unredact additional portions of the Audit Reports, Audit Report Supplements, testimony, and exhibits in order to make such public information publicly available in all documents that are a part of the record in this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

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Summary: Memorandum Joint OMAEG-Kroger Memo Contra Utilities' Motions for Protective Order (21-477-EL-RDR) electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group and The Kroger Co..