**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**REPLY IN SUPPORT OF MOTION FOR A SUBPOENA DUCES TECUM TO AMERICAN ELECTRIC POWER COMPANY, INC.**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

AEP Ohio’s Memorandum Contra has no merit. The PUCO should grant OCC’s Motion for a Subpoena Duces Tecum because it seeks information within OCC’s lawful right to discovery. Moreover, AEP Ohio has no standing to object to OCC’s Motion. OCC’s Motion should be granted.

# II. AEP OHIO LACKS STANDING TO OPPOSE OCC’S MOTION FOR SUBPOENA DUCES TECUM BECAUSE THE MOTION IS DIRECTED TO AMERICAN ELECTRIC POWER COMPANY, INC.

At the outset, the PUCO should reject AEP Ohio’s arguments because AEP Ohio has no standing to raise them. OCC’s Motion was directed to American Electric Power Company, Inc. (“AEP Inc.”). AEP Inc. is the only entity with standing to oppose OCC’s Motion for Subpoena. AEP Inc. did not oppose OCC’s Motion, so the PUCO should grant it.

Under Ohio law, “[i]t is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.”[[1]](#footnote-2) The concept of standing “is defined at its most basic as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.”[[2]](#footnote-3) “To have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties.”[[3]](#footnote-4)

Third-party standing is the approach AEP Ohio attempts to use here. AEP Ohio admits this in its Memorandum Contra: “AEP Ohio *on behalf of its affiliate, AEP Inc.,* respectfully requests that the Commission deny OCC’s Motion and leave the subpoena unsigned.”[[4]](#footnote-5) There is no reason AEP Inc. could not have challenged OCC’s Motion for Subpoena Duces Tecum on its own. AEP Ohio did not advance any reason for trying to invoke the doctrine of third-party standing, which the Supreme Court of Ohio, in an appeal of a PUCO Order, has stated is disfavored: “’[t]hird-party standing is ‘not looked favorably upon…’”[[5]](#footnote-6)

In the same appeal of a PUCO Order, the Supreme Court of Ohio stated that third-party standing may only be approved: "when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently `"close" relationship with the person who possesses the right,' and (iii) shows some `hindrance' that stands in the way of the claimant seeking relief."[[6]](#footnote-7)

AEP Ohio has not even attempted to make this showing and, in fact, it cannot do so. First, AEP Ohio has not shown any injury to itself by virtue of OCC’s request for a subpoena to AEP Inc. Second, AEP Ohio has not demonstrated that AEP Inc. faces any hindrance to challenging OCC’s request for a subpoena.

AEP Inc. is the entity with standing to challenge the Motion for Subpoena Duces Tecum under O.A.C. 4901-1-25. The PUCO’s corporate separation investigation into FirstEnergy’s H.B. 6 activities shows the proper procedure. In that case, OCC filed a motion for subpoena to obtain certain documents held by FirstEnergy Corp., FirstEnergy Service Company and FirstEnergy Foundation.[[7]](#footnote-8) FirstEnergy Corp. and FirstEnergy Service Company filed a motion to quash under O.A.C. 4901-1-25(C) to oppose the motion.[[8]](#footnote-9) This is the procedure AEP Inc. should have followed in the present case.

AEP Ohio has no standing to oppose OCC’s Motion for Subpoena Duces Tecum, so the PUCO should grant OCC’s Motion.

# III. Even if AEP Ohio had Standing (WHICH IT DOESN’T), the PUCO Should Grant OCC’s Motion Because AEP Ohio Failed to Move to Quash or Seek a Protective Order.

Even if AEP Ohio had standing to challenge OCC’s request for a subpoena to AEP Inc. (it did not), the PUCO should overrule AEP Ohio’s Memorandum Contra because AEP Ohio failed to follow the correct procedure for challenging a subpoena.

Under the PUCO’s rules, any person challenging a subpoena can invoke either of two procedures. The first procedure is to file a motion to quash under O.A.C. 4901-1-25(C). A motion to quash may be granted where a subpoena is unreasonable or oppressive.[[9]](#footnote-10) AEP Ohio does not argue that OCC’s request for a subpoena is unreasonable or oppressive.

The second procedure AEP Ohio could have invoked to challenge OCC’s request for a subpoena would have been to file a motion for protective order under O.A.C. 4901-1-24. This rule requires a showing that the order “is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”[[10]](#footnote-11) A motion for protective order must include a showing that the party “has exhausted all other reasonable means of resolving any differences with the party seeking discovery.”[[11]](#footnote-12) The motion must be accompanied by an affidavit of counsel establishing that the party has complied with these requirements.[[12]](#footnote-13) AEP Ohio failed to satisfy any of these requirements.

AEP Ohio has no standing to challenge OCC’s request for a subpoena to AEP Inc. Even if AEP Ohio had standing, however, its challenge is improper because AEP Ohio failed to follow the PUCO’s rules for challenging a subpoena – by filing a motion to quash or a motion for protective order. The PUCO should therefore reject AEP Ohio’s Memorandum Contra and issue the subpoena.

# IV. Even if AEP Ohio had Standing (WHICH IT DOESN’T) and Followed the Proper Procedure to Challenge OCC’s Motion (WHICH IT DIDN’T), the PUCO Should Grant OCC’s Motion Because the Information OCC Seeks is within the Scope of Discovery.

Even if AEP Ohio had standing (which it doesn’t) and followed the correct procedure (which it didn’t), the PUCO should overrule AEP Ohio’s Memorandum Contra because OCC’s request for a subpoena is within the proper scope of discovery.

AEP Ohio challenges OCC’s request for a subpoena on the grounds that it seeks information which is irrelevant to this case.[[13]](#footnote-14) This is not a proper ground for opposing discovery. The scope of discovery allows OCC to seek any information that is reasonably calculated to lead to the discovery of admissible evidence, as established by O.A.C. 4901-1-16(B):

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[[14]](#footnote-15)

The information sought by OCC meets this standard. OCC’s subpoena requested: (1) copies of the May 2021 and August 2022 subpoenas that AEP Inc. received from the U.S. SEC as referenced in AEP, Inc.’s Form 10-Q dated October 27, 2022, at page 182; and (2) copies of all subpoenas that AEP Inc. (and any other AEP entity) received regarding Ohio House Bill 6 (as enacted in 2019).[[15]](#footnote-16) AEP Inc.’s Form 10-Q describes these subpoenas as seeking “documents relating to the passage of HB 6.”[[16]](#footnote-17)

The “documents relating to the passage of HB 6” might include documents relating to the OVEC plants, including prudency of how the OVEC plants were operated. For example, prior to House Bill 6, AEP Ohio was subject to an audit on the prudency of how the OVEC plants were operated that could occur as often as annually.[[17]](#footnote-18) House Bill 6 changed the frequency of these audits. Under House Bill 6, the audits were only required in 2021, 2024, 2027 and 2030.[[18]](#footnote-19) The “documents relating to the passage of HB 6” could include internal discussions related to the audits of the OVEC plants or OVEC plant-related information. This information meets the scope of discovery in the proceeding. It is reasonably calculated to lead to the discovery of admissible evidence. OCC’s request for a subpoena should be granted.

# V. CONCLUSION

Based on all the foregoing reasons, OCC respectfully requests that the PUCO reject AEP Ohio’s Memorandum Contra and grant OCC’s Motion for Subpoena Duces Tecum.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Reply was served by electronic transmission upon the parties below this 6th day of December 2022.

*/s/ John Finnigan*

John Finnigan

Assistant Consumers’ Counsel

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1. *State ex rel. Dallman v. Franklin County Court of Common Pleas,* 35 Ohio St.2d 176, 179 (1973) (*quoting Baker v. Carr,* 369 U.S. 186, 204 (1962)). [↑](#footnote-ref-2)
2. *Ohio Pyro v. Ohio Dept. of Commerce,* 115 Ohio St.3d 375, 381 (2007) (*citing* Black’s Law Dictionary at 1442, Eighth Edition). [↑](#footnote-ref-3)
3. *Util. Service Partners, Inc. v. Pub. Util. Comm’n of Ohio*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d, ¶ 49 (*quoting City of N. Canton v. City of Canton,* 114 Ohio St.3d at ¶ 14). [↑](#footnote-ref-4)
4. AEP Ohio Memorandum Contra at 2 (November 29, 2022) (Emphasis added). [↑](#footnote-ref-5)
5. *Util. Service Partners, Inc. v. Pub. Util. Comm’n of Ohio*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d, ¶ 49, *quoting* *Kowalski v. Tesmer* (2004), [543 U.S. 125, 130](https://casetext.com/case/kowalski-v-tesmer-2#p129), [125 S.Ct. 564](https://casetext.com/case/kowalski-v-tesmer-2), [160 L.Ed.2d 519](https://casetext.com/case/kowalski-v-tesmer-2). 1224 Ohio St.3d 284, 294 (2009) (*quoting City of N. Canton v. City of Canton,* 114 Ohio St.3d at ¶ 49). [↑](#footnote-ref-6)
6. *Id., citing E. Liverpool v. Columbiana Cty. Budget Comm*., [114 Ohio St.3d 133, 2007](https://casetext.com/case/city-of-liverpool-v-columbiana-1#p2007)-Ohio-3759, [870 N.E.2d 705](https://casetext.com/case/city-of-liverpool-v-columbiana-1), ¶ 22, quoting *Kowalski* at 130, [125 S.Ct. 564](https://casetext.com/case/kowalski-v-tesmer-2), [160 L.Ed.2d 519](https://casetext.com/case/kowalski-v-tesmer-2). [↑](#footnote-ref-7)
7. *In the Matter of the Review of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37,* Case No. 17-974-EL-UNC, Motion for Subpoena Duces for FirstEnergy Corp. and FirstEnergy Service Company to produce a "Purported Consulting Agreement" and all Documents related to the Committee of Independent members of the Board of Directors' Internal Investigation and Motion for Subpoena a Duces Tecum for FirstEnergy Foundation to produce IRS Form 990's included attachments for 2018 and 2019 (June 25, 2021). [↑](#footnote-ref-8)
8. *Id.,* FirstEnergy Corp. and FirstEnergy Service Company’s Motion to Quash the Office of the Ohio Consumers’ Counsel’s Subpoenas (July 19, 2021). [↑](#footnote-ref-9)
9. O.A.C. 4901-1-25(C). [↑](#footnote-ref-10)
10. O.A.C. 4901-1-24(A). [↑](#footnote-ref-11)
11. O.A.C. 4901-1-24(B). [↑](#footnote-ref-12)
12. O.A.C. 4901-1-24(B)(3). [↑](#footnote-ref-13)
13. AEP Ohio Memorandum Contra at 5 (November 29, 2022). [↑](#footnote-ref-14)
14. R.C. 4901-1-16(B). [↑](#footnote-ref-15)
15. OCC Motion for Subpoena Duces Tecum at 9 (November 14, 2022). [↑](#footnote-ref-16)
16. *Id.* at 12. [↑](#footnote-ref-17)
17. *See, e.g., In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018,* Case No. 18-1004-EL-RDR; *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019,* Case No. 18-1759-EL-RDR. [↑](#footnote-ref-18)
18. R.C. 4928.148(A)(1). [↑](#footnote-ref-19)