

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the)
Reconciliation Rider of Duke) Case No. 20-167-EL-RDR
Energy Ohio, Inc.)

**MEMORANDUM OF DUKE ENERGY OHIO, INC.,
CONTRA MOTION OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
FOR SUBPOENAS DUCES TECUM FOR
AUDITOR, PUCO STAFF AND PUCO-DESIGNATED REPRESENTATIVE MAKING
OR CONTRIBUTING TO THE AUDIT REPORT
TO ATTEND AND TESTIFY AT EVIDENTIARY HEARING**

Pursuant to the provisions of O.A.C. 4901-1-12(B)(1), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files its memorandum contra (Memorandum Contra) a motion (Motion) for subpoenas *duces tecum*.¹ The Motion attempts to drag completely irrelevant issues pertaining to other utilities into this case and therefore is unreasonable and unjust and should be denied.

As set forth in the Commission-approved Stipulation and Recommendation, “[r]ecovery under Rider PSR shall be subject to the following conditions: . . . The Company shall be subject to an annual prudency review of its *practices relating to liquidating its contractual entitlements under the ICPA in the wholesale market*.”² The rate design for the Rider PSR was approved on December 19, 2018, in Case Nos. 17-32-EL-AIR, *et al.*, and this annual audit is merely to confirm

¹ Motion for Subpoenas *Duces Tecum* for Auditor, PUCO Staff and PUCO-Designated Representative Making or Contributing to the Audit Report to Attend and Testify at Evidentiary Hearing by Office of the Ohio Consumers’ Counsel (October 27, 2021).

² *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.*, Stipulation and Recommendation, p. 19 (April 13, 2018) (emphasis added). *See also* Case No. 20-167-EL-RDR, Entry, p. 4 of attached Request for Proposal No. RA20-PPA-3.

that Duke Energy Ohio has prudently managed its participation and entitlements with regard to the Ohio Valley Electric Corporation (OVEC). This proceeding does not offer an opportunity to litigate whether it is prudent or otherwise desirable for OVEC to continue to operate its facilities or whether it is reasonable for Rider PSR to exist at all. The former is irrelevant, and the latter has already been litigated. But that is exactly what OCC is attempting to do, proposing that the Commission should “closely scrutinize whether the OVEC plants were operated prudently.”³

The Motion filed by OCC on October 27, 2021, asks that the Public Utilities Commission of Ohio (Commission) issue subpoenas *duces tecum* to three witnesses to appear and testify at the upcoming evidentiary hearing, all of whom OCC *seems* to say contributed to the audit report filed on October 21, 2020, in this case (Duke Audit Report).⁴

Note, however, that the two staff members OCC seeks to subpoena are only identified as allegedly having contributed to the Ohio Power Company (AEP) audit report, not to the Duke Energy Ohio report. OCC purports to justify the issuance of these subpoenas by citing email correspondence between the auditor, Marie Fagan, and members of the Staff of the Commission (Staff) regarding edits to an audit report, but *none of the correspondence cited discusses edits to the Duke Audit Report*. Rather, OCC seeks to issue subpoenas in *this* case on the basis of the witnesses’ participation in the editing of the audit report of AEP.

In addition to AEP, OCC even attempts to drag FirstEnergy Solutions into this audit, claiming that an expanded scope is justified because of alleged improprieties leading to the enactment of H.B. 6.⁵ These issues are far beyond the scope of this audit—which takes the existence of the Company’s partial ownership interest in OVEC and the legitimacy of Rider PSR

³ Motion, p. 2.

⁴ Motion, p. 3.

⁵ Motion, p. 1.

as givens—and they do not bear on the prudence of Duke Energy Ohio’s management of that interest and related transactions. Indeed, the Company’s Rider PSR was litigated and approved in 2018, prior to the enactment of H.B. 6. Moreover, OCC previously had its opportunity to challenge the approval of the PSR via an appeal to the Ohio Supreme Court.⁶ Such appeal was ultimately dismissed at the request of OCC, following the Court’s decision to affirm the Commission’s allowance of AEP’s similar rider.⁷ OCC’s attack of the Company’s PSR is nothing more than a late-filed re-attempt at rehearing of issues previously decided by the Commission.

First, the audit of AEP’s similar rider is not at issue in this case; rather, as OCC itself acknowledges, this case is about “whether *‘the Company’s* actions were in the best interest of retail ratepayers.”⁸ Not only are the audit reports of Duke Energy Ohio and AEP distinct reports to be addressed in separate proceedings but, as the Company has previously explained, AEP’s involvement with and participation in OVEC is very different from Duke Energy Ohio’s. Among other things, each company has its own internal process for monitoring offers to PJM, each company participates in the PJM capacity markets independently, and, unlike AEP, Duke Energy Ohio does not provide services, such as coal procurement, for OVEC. The prudence of Duke Energy Ohio’s actions was not at issue in the AEP audit report. Nor should AEP’s actions be at issue in Duke Energy Ohio’s report.

Second, the language recommended to be removed in the emails—which were *only* about the AEP audit report—does not pertain to any imprudent transactions by a utility. Rather, the removed language mentions the investigation around H.B. 6 and also generally criticizes “keeping

⁶ *Interstate Gas Supply, Inc. v. The Public Utilities Commission of Ohio*, Case No. 2019-1269.

⁷ See *In re Ohio Power Co.*, 2020-Ohio-143.

⁸ Motion, p. 2 (quoting Request for Proposal).

the [OVEC] plants running” and “the OVEC contract overall.”⁹ But the issues surrounding H.B. 6 and the questions concerning whether OVEC should continue to run its plants are not at issue in this proceeding. This is just another instance in this case of OCC attempting to enlarge the Company’s burden of proof in these proceedings, as it did in its initial comments when it argued that the Company must “show that all actions related to the OVEC plants were prudent and in consumers’ best interests.”¹⁰ It is not the actions of OVEC, but the actions of Duke Energy Ohio that must have been prudent. The Commission should reject this thinly veiled attempt to broaden the scope of this proceeding.

Third, the only non-Staff member that OCC seeks to depose, Marie Fagan, is already scheduled to testify at the hearing and will be subject to cross-examination on matters relevant to this case (which do *not* include the AEP audit report). Thus, in addition to being otherwise unreasonable, the request to subpoena Ms. Fagan is duplicative and oppressive.

OCC claims that Rule 4901-1-28(A) gives it “a right to” subpoena,¹¹ but the rule merely says that “[a]ny person making or contributing to the report *may* be subpoenaed to testify at the hearing *in accordance with rule 4901-1-25.*” (emphasis added). The only “right” OCC has is a right to move for the issuance of a subpoena pursuant to O.A.C. Rule 4901-1-25. What the Commission does with such a motion is similarly governed by Rule 4901-1-25(A), which directs the attorney examiner or other designated person to sign the subpoena *if appropriate*. It is also noteworthy that O.A.C. Rule 4901-1-25(C) permits the quashing of “unreasonable or oppressive” subpoenas. Because OCC seeks to issue these subpoenas based on edits to another utility’s audit

⁹ Memorandum in Support of Motion, pp. 2-3; Attachment C to Affidavit of John Finnigan.

¹⁰ Initial Comments by the Office of the Ohio Consumers’ Counsel, p. 3.

¹¹ Memorandum in Support of Motion, p. 3.

report in a wholly separate proceeding, and with no involvement of Duke Energy Ohio, the requested subpoenas are incontrovertibly unreasonable.

For all of the above reasons, the Commission should deny the Motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served via electronic mail on the 3rd day of November, 2021, upon the persons listed below.

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