

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	
Proposal to Enter into an Affiliate Power	)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the	)	
Power Purchase Agreement Rider	)	
	)	
In the Matter of the Application of Ohio	)	
Power Company for Approval of Certain	)	Case No. 14-1694-EL-AAM
Accounting Authority	)	

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**MOTION TO QUASH SUBPOENA AND MEMORANDUM IN SUPPORT OF DIRECT  
ENERGY BUSINESS, LLC AND DIRECT ENERGY SERVICES, LLC**

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Pursuant to Ohio Administrative Code ("OAC") 4901 -1-12 and 4901-1-25, Direct Energy Business, LLC and Direct Energy Services, LLC (jointly, "Direct Energy") hereby moves the Public Utilities Commission of Ohio (Commission) to quash the subpoena issued in these proceedings on December 29, 2015. Specifically, Direct seeks to quash in its entirety the subpoena *duces tecum* issued to Direct Energy, directing it to produce an unnamed witness or witnesses who has knowledge and expertise regarding the Joint Stipulation and Recommendation ("Joint Stipulation") filed on December 15, 2015 to testify at a Commission hearing on January 4, 2016, in the above-captioned proceeding.

As discussed further in the attached memorandum in support, the subpoena is unreasonable and unduly burdensome to the extent that it seeks information that is duplicative, not likely to lead to admissible evidence, and is about confidential settlement negotiations that

are protected by attorney client privilege and work product doctrine. Moreover, the subpoena was not issued more than ten days in advance of the hearing as required by Commission rules and the Ohio Consumers' Counsel has not demonstrated good cause for deviation from that requirement. Therefore, Direct Energy seeks a ruling from the Attorney Examiner quashing the subpoena. A memorandum in support of this motion is attached.

/s/ Jennifer L. Spinosi

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On December 14, 2015, AEP Ohio and nine other Signatory Parties entered into a Joint Stipulation and Recommendation ("Joint Stipulation") that proposes to resolve all issues raised in this proceeding. Direct Energy was one of the Signatory Parties to the Joint Stipulation. That same day, AEP Ohio submitted the testimony of William Allen in support of the Stipulation. No other witness has submitted testimony to support the Stipulation.

On December 18, 2015, Ohio Consumers' Counsel ("OCC") served written discovery on Direct Energy with requests for admissions, interrogatories, and requests for production of documents. Direct Energy provided a written response to this discovery request on Monday, December 28, 2015.

On December 23, 2015 at 5:15PM, OCC served a notice of deposition to be held on December 29, 2015, seeking testimony from an unnamed Direct Energy employee(s) who have knowledge and expertise regarding the following three issues:

- 1) Ohio Power's proposal to enter into an affiliate power purchase agreement for inclusion in the power purchase agreement rider;
- 2) The Joint Stipulation filed on December 14, 2015;
- 3) Direct Energy's position regarding the Joint Stipulation.

On December 28, 2015, Direct Energy's counsel notified OCC's counsel in a phone conversation that Direct Energy did not intend to present a witness for deposition but that discovery responses would be provided and that Direct Energy would file a letter in the docket objecting to the request for deposition that same day.

On December 29, 2015, OCC filed a subpoena in this proceeding seeking testimony from unnamed Direct Energy employee(s) at a hearing on January 4, 2015. As discussed below, the Commission should quash the subpoena because it is unreasonable and unduly burdensome to the extent that it seeks information that is duplicative, not likely to lead to admissible evidence, and is about confidential settlement negotiations that are protected by attorney client privilege and work product doctrine. Direct Energy requests that the Commission issue an order quashing the subpoena.

## **II. ARGUMENT**

### **A. The Subpoena and Notice of Deposition are unreasonable, seek information outside the scope of discovery, and are intended to harass.**

OAC 4901-1-25(C) provides that a subpoena may be quashed "if it is unreasonable or oppressive . . . ." Commission precedent holds that a subpoena may be unreasonable or oppressive if it overly broad, unduly burdensome, or requests information not likely to lead to

admissible evidence or otherwise outside the scope of discovery. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Entry at 10-11 (Oct. 22, 2012) (quashing overly broad, unreasonable, and unduly burdensome subpoena) (hereafter “*Champaign*”); *see also Champaign*, Opinion and Order at 9 (May 28, 2013) (affirming ruling because the “request is overly broad and not focused on obtaining information that could be admissible before the Board.”). *In the Matter of the Complaint of Buckeye Energy Brokers, Inc.*, Case No. 10-693-EL-CSS, Entry at 3-4 (Mar. 30, 2011) (quashing subpoena seeking information outside the scope of discovery). Similarly, OAC 4901-1-24 provides that the Commission may issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

Further, Ohio Civil Rule 45 provides that a subpoena shall be quashed if it “subjects a person to an undue burden” or “[r]equires disclosure of privileged or otherwise protected matter...” Under this rule, Ohio courts have quashed subpoenas that seek duplicative information. *In re Gerber Children*, 2008 Ohio 1044 ¶ 44, Ct of Appeals, 5<sup>th</sup> Appellate Dist (“we fail to find any error in the trial court’s quashing of the subpoena which would have been duplicative of the discovery provided by appellee.”).

OCC’s request is overly broad, unduly burdensome and not likely to lead to the discovery of admissible evidence. Although Direct Energy did not submit testimony in this proceeding, it has responded to OCC’s written discovery request and it would be overly burdensome to require Direct Energy to provide a witness at a deposition or in hearing to give testimony on the Joint Stipulation. As previously noted, Mr. Allen has already submitted testimony in support of the Joint Stipulation and has agreed to be available for deposition and cross-examination at the

hearing and therefore there is no need to duplicate his testimony<sup>1</sup>. Finally, as noted in the language of the document, Direct Energy is not obligated to support the Joint Stipulation itself<sup>2</sup>. Therefore, Direct Energy views OCC's request as designed to seek duplicative information and to harass certain Signatory Parties to the Joint Stipulation.

OCC's requests may also call for confidential settlement communications and information subject to attorney client privilege and work product doctrine. Direct Energy's position regarding the Stipulation should self-evident from the language of the Joint Stipulation itself. Further explanation via deposition or cross-examination of a Direct Energy employee are a clear request to examine attorney client communications regarding Direct Energy's rationale for being a Signatory Party. As the Stipulation specifically states, any parties' agreement does not reflect agreement to any particular provision outside the global settlement:

More specifically, no specific element or item contained in or supporting this Stipulation shall be construed or applied to attribute the results set forth in this Stipulation as the results that any Signatory Party might support or seek, but for this Stipulation in these proceedings or in any other proceeding. This Stipulation contains a combination of outcomes that reflects an overall compromise involving a balance of competing positions, and it does not necessarily reflect the position that one or more of the Signatory Parties would have taken on any individual issue. Rather the Stipulation represents a package that, taken as a whole, is acceptable for the purposes of resolving all contested issues without resorting to litigation. The Signatory Parties believe that this Stipulation, taken as a whole, represents a reasonable compromise of varying interests.

Therefore, OCC's attempt to further determine Direct Energy's rationale or position regarding individual provisions of the Stipulation is inappropriate. Finally, Direct Energy has already provided responses to OCC's discovery requests related to the Stipulation. Direct Energy requests that the Commission issue an order quashing the subpoena.

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<sup>1</sup> Commission rules require only one party to file testimony in support of a Stipulation. OAC 4901-1-30.

<sup>2</sup> See Joint Stipulation footnote 16.

**B. The subpoena was not appropriately executed.**

The subpoena should be quashed because it was not properly executed under either OAC 4901-1-25(A)(1) or (2). Those rules provide that a subpoena must be signed by the Attorney Examiner assigned to the case or the leave director or a designee.

(1) A party may file a motion for a subpoena with the docketing division. A completed subpoena form, ready for signature, shall accompany the motion. **The attorney examiner assigned to the case, or the legal director or deputy legal director or their designee, will review the filing and, if appropriate, sign the subpoena.** The attorney examiner, legal director, deputy legal director, or designee will return via United States mail the signed subpoena, with a cover letter, to the party that filed the motion. A copy of the cover letter will be docketed in the case file.

(2) **To receive expedited treatment, a motion for a subpoena and the subpoena itself should first be submitted in person to the attorney examiner assigned to the case, or to the legal director or a designee, for signature of the subpoena.**

The subpoena was signed by Attorney Examiner Mandy Chiles. Because Greta See and Sarah Parrot are the Attorney Examiners assigned to this proceeding, the subpoena was not properly executed.<sup>3</sup>

Moreover, it is too late for OCC to cure this deficiency by obtaining an expedited subpoena from the proper signee. Such a subpoena must be obtained at least five days prior to the hearing. OAC 4901-1-25(E).

**III. CONCLUSION**

OCC's subpoena is unreasonable and unduly burdensome to the extent that it seeks information that is duplicative, is not likely to lead to admissible evidence, and seeks confidential settlement negotiations that are protected by attorney client privilege and work product doctrine.

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<sup>3</sup> See docket sheet <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=14-1693&x=0&y=0>

AEP Ohio along with nine other Signatory Parties have submitted a Joint Stipulation to the Commission for consideration and approval. The Joint Stipulation is supported by the testimony of William Allen, and the Signatory Parties' position regarding the Joint Stipulation is clear from the language in the document itself. It is unduly burdensome and unreasonable to require anything more from Signatory Parties.

Further, it could establish dangerous precedent, effectively establishing a rule that any Signatory Party to a Stipulation could be compelled to further participate in litigation, which would likely have a chilling effect on parties willingness to compromise their litigation positions in settlements. Direct Energy believes that OCC's subpoena runs counter to the theory of settlement in which parties seek to reach a result that allows them to avoid further litigation expense and labor. Direct Energy requests that the Commission issue an order quashing the subpoena.

Respectfully submitted,

/s/ Jennifer L. Spinosi

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Motion to Quash and Memorandum in Support have been served upon the following parties via electronic mail on December 31, 2015.

/s/ Jennifer L. Spinosi  
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Summary: Motion to Quash and Memorandum in Support electronically filed by Ms. Jennifer L. Spinosi on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC