

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Power)
Purchase Agreement Rider of Ohio Power) Case No. 18-1004-EL-RDR
Company for 2018.)

In the Matter of the Review of the Power)
Purchase Agreement Rider of Ohio Power) Case No. 18-1759-EL-RDR
Company for 2019.)

**MEMORANDUM CONTRA AEP'S
MOTION FOR A PROTECTIVE ORDER TO PREVENT OCC FROM TAKING A
DEPOSITION ON OVEC COAL POWER PLANT SUBSIDIES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

As a result of utility proposals and Ohio government approvals (by the PUCO and the legislature), AEP Ohio has been charging its 1.5 million customers to bail out two polluting, uneconomic OVEC coal power plants. We note that some who feed at the public trough do so with a sense of entitlement to their corporate welfare. And that brings us to AEP.

In its Motion for Protection, AEP is bent on thwarting and has already delayed the Ohio Consumers’ Counsel’s mere request to depose an AEP official on the prudence of certain of the coal plant subsidies that it is charging to consumers. It’s an old utility strategy that continues nearly forty years after – and despite – the legislature’s discovery reform statute, R.C. 4903.082. That statute ensures the discovery rights for a party such as OCC that is performing state work to investigate utility monopolies such as AEP. That AEP perceives it has license to even file a Motion to prevent OCC’s deposition suggests that the PUCO has failed to impose sufficient consequences to deter utilities from this obstructionist tactic.

The longstanding Ohio Administrative Code provisions for discovery, some of which date back to 1981 in their current form, are meant to facilitate thorough and adequate preparation...” in PUCO cases.¹ And they’re “intended to minimize commission intervention in the discovery process.”²

Here, the PUCO is conducting annual audits of the charges to consumers for the coal plant subsidies. We consider any subsidy charge for these coal plants to be unreasonable and anti-competitive for consumers to pay. But even with the general approvals by the PUCO and the legislature for subsidizing coal plants, there are prudence issues – and we are investigating those issues for consumers. It is our right under law to do so.

But AEP, despite being a beneficiary of this corporate welfare, is running the state consumer advocate through the wringer with a multitude of claims why OCC’s deposition should be prevented. Even if AEP loses its Motion – it wins, because it is delaying us and wasting our resources. In addition, OCC will need to file a Motion to Compel to obtain AEP’s attendance at the deposition, causing additional waste of resources.

The PUCO ruled that AEP will “bear the burden of proof demonstrating the prudence of all costs and sales during the review, as well as that such actions were in the best interests of retail ratepayers.”³ In this regard, OCC’s interest in investigating AEP’s coal plant charges is sharpened here. The PUCO-approved Auditor concluded that “the OVEC plants cost more than they earn.”⁴ And the Auditor found that OVEC continued running the plants on days when the

¹ Ohio Adm. Code 4901-1-16(A).

² *Id.*

³ See *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (Mar. 31, 2016)

⁴ London Economics International, LLC, *Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company* at 31 (Sept. 16, 2020).

plants earned less revenue from selling electricity than the plants' variable operating costs.⁵ Accordingly, the Auditor recommended that OVEC "carefully consider when and whether its must-run offer strategy is optimal, as it appears that in some months, it may result in negative energy earnings for the plants."⁶ (The reference to "Negative energy earnings" appears to be the Auditor's polite way of saying that these coal power plants are money losers.)

Specifically, AEP asks in its Motion that OCC's deposition not be allowed. And instead, AEP proposes that the PUCO substitute an approach where AEP would answer "informal discovery requests" or "written questions" from OCC. In other words, AEP wants the PUCO to write much of Ohio Adm. Code 4901-1-21 off the books. But Rule 21 is on the books. OCC has a statutory right to use it.⁷ AEP is not JCARR for review of state rules. And AEP should be sanctioned for wasting the time of OCC and the PUCO with its tactics of distraction and delay.

We suggest the PUCO use its authority to penalize AEP, in quarter-million dollar increments, for its delay and distraction tactics. The penalty should be deposited for the use of consumer bill-payment assistance.

OCC's intended consumer protection deposition is reasonable and lawful. In fact, Duke Energy just cooperated with OCC in the scheduling of an OCC deposition regarding coal power plant subsidies.⁸ Instead of obstructing OCC's review of the subsidy charges, AEP should thank its lucky stars that the state gives it any of consumers' money for bailing out costly, polluting coal plants. And it should open its books. The competitive market, that AEP has evaded with

⁵ *Id.* at 9.

⁶ *Id.*

⁷ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

⁸ *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Deposition Transcript of John Swez (Jan. 12, 2021).

these bailouts, would otherwise be providing consumers with lower electric charges and a cleaner environment.

The PUCO should order AEP to open its books and get out of OCC's way in our consumer investigation of the prudence of the coal plant subsidy charges.⁹ In the interest of a fair process for justice in utility regulation and consumer protection, the PUCO should deny AEP's Motion for a protective order.

II. LAW AND ARGUMENT

A. AEP is supposed to show in its motion that a protective order is necessary to protect it from annoyance, embarrassment, oppression, or undue burden or expense. It failed.

A party seeking a protective order must establish, to prevail, that the protective order is necessary to protect it.¹⁰ AEP has not offered any reason why a deposition would result in annoyance, embarrassment, oppression or undue burden or expense. The closest AEP comes to offering a reason why it should receive a protective order is its statement that "it is not clear that the Company has an obligation to conduct discovery in this case,"¹¹ without providing any grounds why it should be exempt from discovery. This argument is baseless.

OCC has a clear right to conduct discovery "to facilitate thorough and adequate preparation in commission proceedings."¹² The PUCO should not grant a protective order when, as in this case, the party seeking the protective order has not provided any specific grounds as to why the discovery sought should be subject to a protective order. A party cannot establish grounds for a protective order by merely offering a summary conclusion, unsupported by any

⁹ OCC will be filing a motion to compel AEP to provide the deponent. But the PUCO should rule against AEP and order the deposition to proceed without OCC having to expend more time on pleadings over this issue.

¹⁰ *Motion of Ohio Power Company for Protective Order* at 4 (Jan. 11, 2021); Ohio Adm. Code. 4901-1-24(A).

¹¹ *Motion of Ohio Power Company for Protective Order* at 2 (Jan. 11, 2021).

¹² Ohio Adm. Code 4901-1-16(A).

specific facts, that the discovery sought will lead to annoyance, embarrassment, oppression or undue burden or expense.

The PUCO should reject AEP's motion for protective order. AEP has not provided any specific reason why a deposition would result in annoyance, embarrassment, oppression or undue burden or expense. There is no real reason.

B. OCC has a right to take its depositions for consumer protection under Ohio law and the Ohio Administrative Code.

OCC reasonably exercised its right under Ohio Adm. Code 4901-1-21 to take the testimony of AEP ("any party") by deposition on oral examination with respect to matters within the scope of discovery in this proceeding. OCC intends to use the discovery tool of a deposition as the best available tool for investigating the Auditor's recommendation that OVEC reconsider its must-run offer strategy. OCC has a right under the 1983 reform law, R.C. 4903.082, to conduct discovery.

Depositions are often considered the most important effective tool in an attorney's toolbox. They allow for much more information to be gleaned and sooner, as compared to written discovery. Depositions, most importantly, allow for instantaneous follow-up to questions that are posed. Depositions allow attorneys to press for more information if answers are not detailed or forthcoming. In reality, these well-known fundamentals of the deposition as a discovery tool explain why AEP wants the PUCO to prevent OCC from taking depositions.

In this proceeding, where AEP bears the burden of proving its prudence, OCC is exploring the prudence of using the OVEC units as must-run units. As noted by the Auditor, there are times when this causes negative earnings for the plants, to the detriment of AEP customers.

This complex issue is best explored in a deposition, where a witness can be asked to explain the intricate details involved with the daily operations of the uneconomic power plants. The data to be considered include PJM day-ahead energy market prices and forward energy prices, as well as the following factors:

unit start-up costs, start-up times, cycling costs, risks with powering down and powering up units, such as unexpected outages that occur as a result of additional unit cycling, an operation that is required for environmental and other testing, impacts of multiple unit startups and shutdowns, as well as the loss of option values by missing the opportunity to respond to power price changes.¹³

OCC is assessing how various factors contributed to the must-run decision during the 2018-2019 audit period. A deposition is appropriate for OCC's assessment of these matters that are related to what consumers pay.

C. Parties are not limited to choosing one form of discovery over another.

In the present case, AEP Ohio argues that OCC should not be permitted to take a deposition when OCC can resort to informal or written discovery to investigate this complex issue.¹⁴ But the Ohio rules leave case preparation to the parties, per Ohio Adm. Code 4901-1-16(A). Under that state Code, OCC has the right to prepare its own case using the discovery tools it chooses, not the ones that AEP would like to choose for OCC to hinder our consumer advocacy.

Indeed, there sometimes seems to be no pleasing utilities in regulatory cases. In a case where OCC used written discovery requests to investigate complex issues, the utility objected by

¹³ *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Reply Comments of Duke Energy Ohio, Inc. at 18 (Jan. 8, 2021).

¹⁴ *Motion of Ohio Power Company for Protective Order* at 4 (Jan. 11, 2021).

stating that OCC should instead use *depositions* to investigate complex issues. Here is an example of this objection:

DP&L objects to each and every interrogatory that can be answered more efficiently by the production of documents or by the taking of depositions. Under the comparable Ohio Civil Rules, "[a]n interrogatory seeks an admission or it seeks information of major significance in the trial or in the preparation for trial. It does not contemplate an array of details or outlines of evidence, a function reserved by rules for depositions." Penn Cent. Transp. Co. v. Armco Steel Corp., 27 Ohio Misc. 76, 77, 272 N.E.2d 877, 878 (Montgomery Cty. 1971). As Penn further noted, interrogatories that ask one to "describe in detail," "state in detail," or "describe in particulars" are "open end invitation[s] without limit on its comprehensive nature with no guide for the court to determine if the voluminous response is what the party sought in the first place." *Id.*, 272 N.E.2d at 878.¹⁵

The Ohio Administrative Code allows for all types of discovery. Per Ohio Adm. Code 4901-1-16(B): "Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission." AEP Ohio's argument – that it is entitled to a protective order because it would prefer for OCC to proceed informally or to use interrogatories instead of a deposition – is without merit.

D. OCC's deposition notice was timely.

AEP Ohio also seeks a protective order because OCC did not request a deposition earlier in the proceeding.¹⁶ This argument is without merit. The Ohio Administrative Code provides that discovery may be conducted throughout the case, until the hearing begins.¹⁷ A hearing has

¹⁵ *In the Matter of the Review of the Reconciliation Rider of The Dayton Power & Light Company*, Case No. 20-165-EL-RDR The Dayton Power & Light Company's Objections and Responses to the Ohio Consumers' Counsel's Interrogatories and Requests for Production of Documents (Second Set) at 3 (Jan. 6, 2021).

¹⁶ *Motion of Ohio Power Company for Protective Order* at 4 (Jan. 11, 2021).

¹⁷ Ohio Adm. Code 4901-1-17.

not yet been scheduled in the present case. The attorney examiner did not issue an order establishing a discovery cut-off date. Under the Ohio Administrative Code, OCC was not required to seek a deposition at some earlier stage of the proceedings. The PUCO should reject this AEP argument for a protective order.¹⁸

E. Neither the Ohio Administrative Code nor PUCO precedent precludes depositions from being conducted in cases that have not been set for hearing.

AEP Ohio suggests that the PUCO should grant a protective order because a deposition is improper in that no hearing is presently scheduled or contemplated.¹⁹ The Ohio Administrative Code does not prohibit the use of depositions in cases where no hearing is scheduled. To the contrary, the rules broadly provide parties with an unlimited right to take depositions:

Any party to a pending commission proceeding may take the testimony of any other party or person, other than a member of the commission staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code.²⁰

By arguing that depositions can be used only in cases involving a hearing, AEP Ohio is attempting to re-write the Ohio Administrative Code on depositions. Not even JCARR does that. The PUCO should reject this argument.

¹⁸ The PUCO has ruled that parties make take depositions after the discovery cutoff date. *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan*, Case No. 99-1658-EL-ETP Entry at 3-4 (Mar. 2, 2000) (“It should also be noted that the Commission's long-standing procedural rules for rate proceedings (See, e.g., Rules 4901-1-17(B) and 4901-1-29(A)(1)(a)(i), O.A.C.) include a discovery cut-off date that precedes the filing of intervenor testimony. However, the Commission's procedural rules permit parties to notice depositions after the deadline for serving written discovery requests. As set forth in Rule 4901-1-21(B), O.A.C., any party may take the deposition of any person upon giving ‘reasonable notice in writing to the deponent, to all parties, and to the commission.’”).

¹⁹ *Id.*

²⁰ Ohio Adm.Code 4901-1-21(A).

F. OCC provided reasonable notice of its deposition for consumer protection.

AEP Ohio next argues that a protective order is warranted because OCC failed to give reasonable notice of the deposition. AEP Ohio argues that OCC acted unreasonably because it filed a notice of deposition with only six days advance notice.²¹

In fact, OCC's counsel called AEP Ohio's counsel as a professional courtesy several days before filing the deposition notice and left a voicemail message, describing the information sought and asking AEP Ohio's counsel to provide a date when the deposition would be convenient. AEP Ohio's counsel never returned this call. So OCC issued the deposition notice. But even then, AEP could have contacted OCC after the filing of the deposition notice to request a different time. It didn't.

The PUCO should therefore reject this AEP argument for a protective order.

G. AEP must respond to OCC's consumer discovery unless a protective order is issued.

In addition, AEP Ohio argues that it would be justified in refusing to respond to OCC's discovery requests at all, although AEP Ohio gives no reason why it would be so justified.²² This argument is incorrect.

The Ohio Administrative Code states that a party may obtain discovery of any relevant matter if it is not privileged.²³ OCC seeks a deposition mainly to obtain information about why OVEC used a must-run commitment status in the PJM day-ahead energy market. The Auditor recommended that OVEC should reconsider committing the plants as must-run.²⁴ Consequently,

²¹ *Id.*

²² *Motion of Ohio Power Company for Protective Order* at 5 (Jan. 11, 2021).

²³ Ohio Adm.Code 4901-1-16(B).

²⁴ London Economics International, LLC, *Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company* at 9 (Sept. 16, 2020).

the information OCC seeks through a deposition is relevant. AEP Ohio has not argued that this information is privileged.

Here, we have a utility that believes it is above the rules of the Ohio Administrative Code. It isn't. The PUCO should reject AEP's argument for a protective order.

H. OCC, like other parties, can choose its form of discovery.

Finally, AEP Ohio argues that it is entitled to a protective order because it is willing to provide information to OCC through informal discovery or written interrogatories.²⁵ This argument has no merit. The rules of the Ohio Administrative Code recognize that parties may engage in informal discovery, but that would be at their choice.²⁶ AEP wrongly wants to make that discovery choice, the choice that suits its purposes, for OCC.

Note that the informal discovery that AEP recommends would not result in the transcript that a deposition provides. Note that informal discovery can have limitations or challenges for use as evidence. Note that informal discovery would not have the oath and the law against perjury as would a deposition. Note that informal discovery could still lead to more disputes at the PUCO for resolution.

AEP Ohio also alleges that a protective order is warranted because it is willing to answer written interrogatories. Actually, the Ohio Administrative Code requires AEP to answer interrogatories, just as it requires AEP to attend this deposition. Nothing in the Ohio Administrative Code suggests that AEP and its lawyers should control or limit OCC to a form of discovery, not to mention a form of discovery that favors AEP. Indeed, Ohio Adm. Code 4901-1-16(B) provides a list of discovery types that may be used. We have chosen from that list for

²⁵ *Motion of Ohio Power Company for Protective Order* at 5 (Jan. 11, 2021).

²⁶ Ohio Adm.Code 4901-1-16(F).

our consumer advocacy. The PUCO should therefore reject AEP's argument for a protective order.

III. CONCLUSION

It is stated in the Ohio Administrative Code that discovery is "to facilitate thorough and adequate preparation for participation in commission proceedings."²⁷ We need the protection of the Code, where the PUCO must move AEP out of our way in our case preparation for consumers. In the interest of a fair process for justice in utility regulation and consumer protection, the PUCO should deny AEP's Motion for a protective order.

Respectfully submitted,

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²⁷ Ohio Adm.Code 4901-1-16(A).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 20th day of January 2021.

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