

**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 OHIO POWER COMPANY’S
MOTION FOR PROTECTIVE ORDER
OF
THE OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

On January 15, 2020, the Public Utilities Commission of Ohio (Commission) directed the Staff of the Commission to issue a request for proposal for audit services to assist the Commission in its review of Ohio Power Company’s (AEP) Power Purchase Agreement Rider (PPA Rider) for the period of January 1, 2018 through December 31, 2019.¹ The auditor was to review the costs and revenues associated with AEP’s 19.93 percent ownership interest in the Ohio Valley Electric Corporation (OVEC) that are included in AEP’s PPA Rider assessed to customers. On September 16, 2020, the auditor filed its audit report and made several recommendations to the Commission.²

OMAEG intervened in the case and issued discovery on January 11, 2021. On the same day, AEP attempted to limit the scope of the Commission’s review and the intervenors’ participation in the proceeding, including attempting to limit the amount and methods of discovery available to intervenors, by filing a Motion for Protective Order (Motion). AEP’s Motion attempts

¹ Entry at ¶ 7 (January 15, 2020).

² Audit Report (September 16, 2020).

to limit discovery by prohibiting a deposition (and a request to obtain documents) pursuant to a Notice to Take Depositions and Requests for Production of Documents served on January 7, 2021 by the Office of the Ohio Consumers' Counsel's (OCC).³ Interestingly, AEP stated in its Motion that "it is not clear that the Company has an obligation to conduct discovery in this case" and incorrectly implies that a hearing must be set or contemplated prior to engaging in discovery.⁴

The Commission opened a proceeding to review the OVEC costs that AEP assessed customers during the audit period, specifically calling it a proceeding and establishing a comment period and subsequent procedural schedule.⁵ On January 19, 2021, the Commission vacated the comment period to prevent prejudice to interested parties, stated that it will establish a new comment period in a subsequent entry, and directed intervenors to file memoranda contra AEP's Motion by January 26, 2021.⁶

As explained further below, the Commission should deny AEP's Motion and prevent AEP from limiting the Commission's review and intervenors' participation therein. In accordance with the Commission's directive in its January 19, 2021 Entry, OMAEG hereby files its Memorandum Contra AEP's Motion.⁷

II. ARGUMENT

The Commission should deny AEP's Motion because it fails to satisfy the requisite standard set forth in Ohio Adm. Code 4901-1-24. The goal of the discovery rules is to "encourage prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate

³ AEP's Motion at 1.

⁴ AEP's Motion at 2.

⁵ Entry at ¶ 11 (January 15, 2020); Entry at ¶ 8 (December 7, 2020).

⁶ Entry at ¶ 17 (January 19, 2021).

⁷ Id.

preparation for participation in [Commission] proceedings.”⁸ That is exactly what the intervenors seek through a deposition of an AEP representative: discovery during the prehearing phase of the proceeding in order to adequately participate in the proceeding, including the filing of comments. The rule does not require that a hearing be held; it only explains the timing of the discovery. In addition, contrary to what AEP implies, the Commission has not ruled that a hearing is unnecessary and it merely established a comment period first. Accordingly, AEP’s Motion is an unwarranted attempt to prevent the intervenors from thoroughly and adequately preparing their positions and arguments for the proceeding, regardless of the type of proceeding that is ultimately conducted. The Motion should be denied.

Parties⁹ “may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding [as long as] the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁰ Such 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.”¹¹ Notably, “[t]he frequency of using these discovery methods is not limited”¹² unless the “party or person from whom discovery is sought” shows that a protective order is “necessary to protect [such] party or person from

⁸ Ohio Adm. Code 4901-1-16(A).

⁹ For purposes of discovery, Ohio Adm. Code 4901-1-16(H) defines a party as any person who has filed a motion to intervene (“For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term ‘party’ includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.”).

¹⁰ Ohio Adm. Code 4901-1-16(B).

¹¹ *Id.* (emphasis added).

¹² *Id.*

annoyance, embarrassment, oppression, or undue burden or expense.”¹³ AEP has not met that burden here.

AEP failed to explain how one deposition would be unduly annoying, embarrassing, oppressive, burdensome, or expensive. Additionally, any potential burden that AEP may face is minimal when viewed in relation to the Commission’s review itself. AEP is more than capable of exercising its rights during the deposition to protect against any potential abuses of the discovery process. Lastly, AEP received adequate notice of the deposition and cannot demonstrate that the discovery method is harassing or unduly burdensome. Consequently, the Commission should deny AEP’s Motion, as it does not satisfy the requirements of Ohio Adm. Code 4901-1-24.

A. AEP’s attempt to limit the scope of the Commission’s review should be rejected.

The Commission stated, “that *any* conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding.”¹⁴ Notwithstanding this clear language, AEP claims that it will endure an undue burden should its one representative be deposed about any PPA Rider costs that may have been assessed to customers due to FirstEnergy Solutions’ OVEC entitlement or OVEC’s “must run” offer strategy in the PJM market. Again, Ohio Adm. Code 4901-1-16(B) provides that “any party to a commission proceeding may obtain discovery of *any matter*, not privileged, which is *relevant* to the subject matter of the proceeding.” (emphasis added). The rule further permits the discovery of information reasonably calculated to lead to the discovery of admissible evidence.¹⁵ Essentially, AEP sought a protective order to prevent its one representative from answering questions directly related to the purpose of this

¹³ Ohio Adm. Code 4901-1-24.

¹⁴ Entry at ¶ 11 (January 15, 2020) (emphasis added).

¹⁵ Ohio Adm. Code 4901-1-16(B).

proceeding and expressly authorized by the Ohio Administrative Code as the information is reasonably calculated to lead to the discovery of admissible evidence.

In addition, AEP strongly implied that depositions are unnecessary because there will be no hearing.¹⁶ However, the extent of the Commission’s review and the procedural posture and schedule are yet to be determined. Ohio Adm. Code 4901-1-17(A) authorizes discovery to begin “immediately after a proceeding is commenced.” Accordingly, intervenors typically are afforded full discovery rights, even in proceedings without scheduled hearings.¹⁷ Additionally, even if the Commission elects not to hold a hearing, AEP’s request conflicts with the Commission’s rules. In proceedings where the Commission solicits comments, parties generally have discovery rights, including the right to depose any other party or person.¹⁸

The scope of this proceeding is still developing and the procedural posture may extend beyond the filing of comments. The purpose of depositions is to allow intervenors to gather relevant information in preparation of their case,¹⁹ which holds true regardless of the procedural posture of the case. While AEP characterizes interrogatories and depositions as interchangeable discovery methods,²⁰ this is simply untrue. Each method has distinct advantages and disadvantages. For example, depositions provide intervenors with an opportunity for spontaneous,

¹⁶ See AEP’s Motion at 2.

¹⁷ See, e.g., *In the Matter of the Commission’s Investigation into PALMco Power OH, LLC DBA Indra Energy and PALMco Energy OH, LLC DBA Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI Entry at ¶ 15 (March 9, 2020) (scheduling a discovery conference in a Commission investigation prior to granting any stakeholder intervention or determining that a hearing would be held); *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Service Supplier*, Case Nos. 11-5886-EL-CRS, et al., Entry at ¶ 11 (March 3, 2020) (establishing a deadline to respond to discovery requests in a Commission investigation before granting any stakeholder intervention or determining that a hearing would be held).

¹⁸ See Ohio Adm. Code 4901-1-16(H); Ohio Adm. Code 4901-1-21(A).

¹⁹ *In the Matter of the Complaint of Randustrial Corp.*, Case No. 81-1507-TP-CSS, 1982 WL 973394, Entry at ¶ 5 (May 12, 1982).

²⁰ See, e.g., AEP’s Motion at 4.

direct contact with the deponent and the immediate ability to ask clarifying or follow-up questions.²¹ Limiting the methods of discovery available in this case would thwart a full and complete development of the record and impair the ability of intervenors to protect their real and substantial interests in this proceeding. Therefore, the Commission should deny AEP's Motion to impede the discovery of information directly related to the purpose of the review.

B. AEP failed to establish that one deposition is harassing or unduly burdensome.

AEP argued that it would face an undue burden and require a protective order because OCC seeks to depose its representative on topics that were also the subject of OCC's prior written discovery.²² However, the Commission has previously determined that "depositions are not necessarily improper because substantial information (such as written testimony) is already available to a party and that the use of oral depositions in such a situation need not be precluded."²³ While the facts of each case are unique, the Commission has denied protective orders in cases where movants have alleged significantly greater burdens than those referenced by AEP.²⁴

Even if AEP was correct (which it is not) that asking an undetermined amount of questions related to prior discovery requests imposes an undue burden, the deposing intervenors still maintain a substantial interest in asking questions not covered by or not directly related to the prior discovery.²⁵ Finally, adopting a minimal standard of proof for a protective order, such as the

²¹ § 38:2. Advantages and disadvantages of depositions, 5 Ohio Jur. Pl. & Pr. Forms § 38:2 (2018 ed.).

²² AEP's Motion at 4.

²³ *In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 79-1184-TP-AIR, 1980 WL 625298, Entry at ¶ 5 (August 4, 1980).

²⁴ See, e.g., *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 88-170-EL-AIR, 1988 WL 1617999, at ¶ 4 (June 10, 1988) (denying The Cleveland Electric Illuminating Company and The Toledo Edison's Motion for Protective Order against the second deposition of a witness already deposed).

²⁵ See, e.g., *Dominion Retail, Inc. v. Dayton Power and Light Company*, Case No. 03-2405-EL-CSS, 2004 WL 1922982, Entry at ¶ 6 (June 29, 2004) (determining that despite self-explanatory evidence, deposing parties

standard AEP advocated for, would theoretically eliminate depositions in Commission proceedings. Often a possibility or likelihood exists that deposing intervenors will ask questions or follow-up questions related to subjects previously covered in interrogatories. However, Ohio Adm. Code 4901-1-24 protects deponents against *undue* burdens, not minimal or speculative burdens such as those cited by AEP. Consequently, the Commission should deny AEP's Motion.

C. Any potential burden that AEP may face from depositions is minimal when viewed in relation to the proceeding.

AEP further claims that a deposition would subject it to an undue burden because at the time OCC issued a notice of deposition, it had already served AEP with four interrogatory requests.²⁶ In determining the standard movants must meet to satisfy Ohio Adm. 4901-1-24, the Commission concluded that, "the question is not the number of interrogatories, or the fact that the interrogating party is using successive methods of discovery,... but whether or not the demands are unduly burdensome or oppressive when viewed with relation to the case itself."²⁷ The above-captioned proceeding concerns the PPA Rider through which AEP has recovered several millions of dollars from its customers to subsidize the company's interest in uneconomic coal plants. AEP's customers have no choice but to pay the PPA Rider rates and participating in the Commission-ordered audit is one of the primary methods of recourse available to customers. Therefore, the Commission should deny AEP's Motion as any alleged burden it will face is de minimis compared to the context of the proceeding.

retained an interest in deposing witnesses about matters not covered by the evidence or not directly related to the evidence).

²⁶ AEP's Motion at 4.

²⁷ *In the Matter of the Application of Columbus and Southern Ohio Electric Company for Authority to Amend & Increase Certain of Its Rates & Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserve.*, Case No. 81-1058-EL-AIR, 1982 WL 974263, Entry at ¶ 6 (June 7, 1982).

D. A protective order is unnecessary because AEP has failed to demonstrate that it is incapable of exercising its rights to protect against any potential abuses of the discovery process during depositions.

There is no reason to believe that any abuse of the discovery process would occur during a deposition in the above-captioned proceeding and AEP failed to demonstrate bad faith on behalf of any intervenors. Parties, including AEP, participating in the deposition are more than capable of exercising their rights and ensuring that discovery is conducted in accordance with the Commission's rules.²⁸ The Commission should deny AEP's Motion because it fails to explain why existing rights are insufficient to protect its interests in the unlikely event that any abuse of the discovery process occurs during a deposition.

E. AEP cannot establish that a deposition would be harassing or unduly burdensome when it received adequate notice.

In evaluating whether discovery requests subject a party or individual to harassment or an undue burden, the Commission has previously evaluated the adequacy of the notice provided.²⁹ AEP incorrectly argued that OCC's notice of deposition was inadequate.³⁰ As OCC notes in its memorandum contra, AEP had the option to cooperate with OCC to select a more convenient time.³¹ Intervenors should not be penalized for AEP's failure to do so. Moreover, the Commission did not elect to establish a cut-off for discovery and AEP is unilaterally seeking to impose its own

²⁸ See, e.g. *In the Matter of the Application of the Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 77-553-EL-AIR, 1977 WL 424255, Entry at ¶¶ 12 -13 (December 7, 1977) (denying a Motion for Protective Order against the use of depositions because movant failed to demonstrate bad faith of the deposing parties and the Commission determined counsel for participating parties would be aware of and capable of exercising their rights should any abuse of the discovery process occur in a deposition).

²⁹ *In the Matter of the Application of the Ohio Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 79-1184-TP-AIR, 1980 WL 625298, Entry at ¶ 5 (August 4, 1980).

³⁰ See AEP's Motion at 4.

³¹ See OCC's Memorandum Contra at 9.

arbitrary deadline without any basis in the Commission's rules. Therefore, OMAEG respectfully requests that the Commission deny AEP's Motion.

III. CONCLUSION

For the aforementioned reasons, the Commission should deny AEP's Motion.

Respectfully Submitted,

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