BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company.	)))	Case No. 20-165-EL-RDR

REPLY MEMORANDUM IN SUPPORT OF JOINT MOTION TO COMPEL DEPOSITION OF DP&L BY OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

The Dayton Power and Light Company ("AES/DP&L") wants to prevent the intervening parties from deposing company witnesses to obtain more information about issues raised in the audit report. The Public Utilities Commission of Ohio ("PUCO") should reject AES/DP&L's efforts to block the depositions and allow the parties to go forward with their investigation so as to better inform the PUCO's decision in this case.

The present case involves Ohio Valley Electric Corporation ("OVEC") subsidies for 2019 under a rider approved by the PUCO, prior to the effective date of H.B. 6.

The question the PUCO must answer is: were the plants prudently managed? The auditors' reports in the Ohio Power Company ("AEP") and Duke Energy Ohio, Inc. ("Duke") OVEC cases strongly suggest that they were not because the plants were designated as a must-run for the entire year, and that was imprudent. In fact, the must-run strategy caused losses of approximately $70 million for the customers of AES/DP&L, AEP, and Duke in 2019.[1]

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") sought to depose an AES/DP&L witness on these matters. A deposition is also needed to determine whether AES/DP&L's customers were adversely impacted by AES/DP&L's decision to accept a share of the FirstEnergy Solutions' ("FES") OVEC entitlement after FES filed for bankruptcy.

Despite the relevancy of these issues and the significant cost to customers, AES/DP&L continues to resist a deposition. OCC and OMAEG need the PUCO to grant their motion to compel AES/DP&L to produce a witness for deposition. Allowing the deposition to go forward will facilitate OCC's preparation of comments and better inform the PUCO of the matters in this case.

II. BACKGROUND

How the OVEC plants were committed into the PJM Day-Ahead Energy Market is an important issue in not just this proceeding, but in in the related AEP and Duke OVEC Audit Cases (Case Nos. 18-1004, et al. and Case No. 20-165-EL-RDR, respectively). The auditor in the AEP OVEC Audit Case concluded that "some of the

[1] Runnerstone, LLC, *Ohio's Costly – and Worsening – OVEC Situation* at 1 (Nov. 12, 2020), available at: https://www.ohiomfg.com/wp-content/uploads/Ohios-Worsening-OVEC-Situation-11.9.2020-Final.pdf.

time, the PJM energy price did not cover fuel and variable cost."[2] And the auditor of AEP recommended that "OVEC reconsider its 'must-run' offer strategy."[3]

The auditor's too-polite words support that the PUCO in the three AEP, Duke and AES/DP&L (OVEC) Audit Cases should consider whether the utilities are acting in the best interests of consumers to minimize the coal subsidies that the PUCO enabled. Interestingly, a similar issue involving Indiana coal-fired power plants recently has been addressed by MISO's market monitor (Potomac Economics), Potomac concluded that "[u]nfortunately, a small share of integrated utilities operate much less efficiently than others."[4] Although OVEC is in PJM, this description certainly seems apt for OVEC's staggering losses.

Moreover, the PUCO has asserted that it will closely scrutinize OVEC's operations to ensure OVEC's practices are "in the best interest of retail [customers]."[5] The PUCO has also stated that when reviewing OVEC costs it will hold the utilities and OVEC to the following standard:

> Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the plants is not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.[6]

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[2] *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018* Case No. 18-1004-EL-RDR Audit Report at 9 (Sept. 16, 2020).

[3] *Id.*

[4] Potomac Economics, *A Review of the Commitment and Dispatch of Coal Generators in MISO* at 2 (Sept. 2020).

[5] *In re Ohio Power PPA Rider,* Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

[6] *Id.*

The PUCO adopted this standard of review in response to a point that PJM raised in an amicus brief. More specifically, PJM urged the PUCO to hold OVEC and the utilities (AEP, Duke and AES/DP&L) to the same conduct expected of a competitive generator. PJM noted in its *amicus* brief that the PUCO would need to follow this standard to ensure that companies would build new power plants in Ohio because:

> [T]he PUCO Oversight Provision, more than any other in the Stipulation, has the greatest potential to impact the effectiveness of the wholesale market in Ohio for stimulating new investment. Moreover, since the Commission has stated that the PJM marketplace remains the primary vehicle it intends to utilize to attract and incent new generation resources, how this Commission implements this provision is critically important to whether those Ohio-specific goals can be achieved.[7]

The cost of producing electricity from the two AES/DP&L/OVEC coal plants is much higher than the cost of electricity obtained from competitive wholesale auctions. And that significant above-market cost is subsidized for the benefit of AEP, Duke and AES/DP&L who own the plants through charges to consumers, per a PUCO-approved nonbypassable charge that is part the utilities' standard offers. OCC and OMAEG need to depose an AES/DP&L witness to explore whether the plants were operated in accordance with the same standards that a competitive generator would have used.

Another issue is whether AES/DP&L customers were adversely impacted by AES/DP&L's decision to accept a share of the FES' OVEC entitlement when FES filed for bankruptcy. The auditor in the AEP OVEC Audit Case noted that "the FirstEnergy

[7] *In re Ohio Power PPA Rider,* Case No. 14-1693-EL-RDR Brief for *Amicus Curiae* PJM Interconnection, L.L.C. at 4 (Feb. 1, 2016).

Solutions bankruptcy impacted OVEC and AEP Ohio charges."[8] OCC and OMAEG need to depose an AES/DP&L witness to resolve this issue and determine whether any costs to customers should be disallowed.

III. ARGUMENT

A. Intervening parties have a right to ample discovery under law, including cases where no evidentiary hearing has been scheduled.

As OCC and OMAEG noted in their Motion to Compel, R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery."[9] The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases.

Despite OCC and OMAEG's ample discovery rights afforded by statute, AES/DP&L asserts that intervening parties have no right to depose witnesses in a PUCO case where no evidentiary hearing has been scheduled. This view is contrary to the PUCO's rules on depositions. O.A.C. 4901-1-21 states that "Any party to *a pending commission proceedi*ng may take the testimony of any other party, or person*** with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code." This is a pending commission proceeding. The PUCO has ordered an audit, commencing the proceeding and the audit is subject to review and adjudication. Contrary to AES/DP&L's assertion otherwise, there is no prohibition on conducting a deposition in pending commission proceeding that does not have a scheduled hearing.

[8] *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR Audit Report at 16 (Sept. 16, 2020).

[9] *See also* OCC v. PUC, 111 Ohio St.3d 300, 2006-Ohio-5789.

And yet, AES/DP&L ignores the PUCO deposition rule and persists in opposing the deposition without any case law to support its argument. The reason AES/DP&L cites no cases is because the PUCO has never adopted AES/DP&L's restrictive view, which would preclude discovery by deposition in this pending PUCO proceeding

In fact, the PUCO has allowed depositions in cases where no evidentiary hearing has been scheduled. The most recent example is a case exploring Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, "FirstEnergy") potential political and charitable spending in support of H.B. 6. In that case, intervening parties deposed FirstEnergy affiant Mr. Santino Fanelli even though no evidentiary hearing has been scheduled.[10]

AES/DP&L's argument that the PUCO does not allow depositions in such cases is without merit and contrary to PUCO rule and precedent. The PUCO should therefore reject this argument.

B. Intervening parties have a right to depose witnesses in cases where the PUCO has hired an independent auditor and the intervening parties have issued written discovery requests.

AES/DP&L next argues that intervening parties are not entitled to take depositions in cases where the PUCO has hired an independent auditor and the intervening parties have issued written discovery requests. Once again, AES/DP&L cites no cases to support this novel proposition, which is contrary to established PUCO rule and precedent.

[10] *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 20-1502-EL-UNC Amended Notice to Take Deposition and Request for Production of Documents by the Office of the Ohio Consumers' Counsel (Jan. 27, 2021).

An example is the pending Duke OVEC Audit Case. In that case, the PUCO hired an independent auditor to examine the Duke OVEC charges. OCC and OMAEG intervened in that case and issued written discovery requests. Subsequently, OCC and OMAEG also took the deposition of John Swez, a Duke witness, and Duke voluntarily submitted to the deposition.[11] In fact, OCC and OMAEG discussed Mr. Swez's deposition at page 5 of their Memorandum in Support of Motion to Compel.

AES/DP&L's argument that the PUCO does not allow depositions in cases where an independent auditor has been hired and written discovery has been issued is baseless and contrary to PUCO rule and precedent. The PUCO should therefore reject this argument.

C. Seeking to depose a company witness is a lawful exercise of intervening parties' discovery rights and does not amount to unlawful harassment.

Finally, AES/DP&L argues that OCC and OMAEG are engaging in unlawful harassment by seeking to depose an AES/DP&L witness. Once again, AES/DP&L cites no cases to support this astounding proposition and AES/DP&L's argument is contrary to established PUCO precedent.

As OCC and OMAEG noted in their Motion to Compel, depositions are often an important method for attorneys to obtain information. They allow for more thorough and probing examination 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

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

reality, these well-known fundamentals of the deposition as a discovery tool explain why AES/DP&L wants the PUCO to prevent the intervenors from taking depositions.

When OCC submitted written discovery requests on these issues, AES/DP&L stated that OCC should have used depositions to investigate complex issues, as shown below:

> 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. [12]

Now that OCC and OMAEG seek a deposition, AES/DP&L whipsaws the parties by arguing that a deposition would amount to unlawful harassment (even though AES/DP&L suggested that OCC/OMAEG should take in lieu of written discovery). By objecting to a party's written discovery and now objecting to parties' attempt to take a deposition, AES/DP&L would leave no method of discovery available to parties, contrary to Ohio law and PUCO rules. Accepting AES/DP&L's refusal to provide discovery would not afford OCC and OMAEG their ample rights to discovery to which they are

[12] *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) (emphasis added).

entitled by law and rules. The PUCO should therefore reject AES/DP&L's argument and allow the deposition to proceed.

IV. CONCLUSION

For the reasons discussed above, the PUCO should grant OCC and OMAEG's Motion to Compel and require AES/DP&L to produce a witness for deposition.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Memorandum in Support of Joint Motion to Compel Deposition of DP&L was served on the persons stated below via electric transmission this 1st day of April 2021.

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Summary: Reply Reply Memorandum in Support of Joint Motion to Compel Deposition of DP&L by Office of The Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Tracy J Greene on behalf of Finnigan, John