

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018.)	Case No. 18-1004-EL-RDR
)	
In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019.)	Case No. 18-1759-EL-RDR
)	
In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company.)	Case No. 20-165-EL-RDR
)	
In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.)	Case No. 20-167-EL-RDR
)	
In the Matter of the OVEC Generation Purchase Rider Audits Required by R.C. 4928.148 for Duke Energy Ohio, Inc. the Dayton Power and Light Company, and AEP Ohio.)	Case No. 21-477-EL-RDR
)	

**MOTION FOR SUBPOENA *DUCES TECUM* FOR
DESIGNATED REPRESENTATIVE OF OHIO VALLEY ELECTRIC CORPORATION
TO ATTEND AND TESTIFY AT DEPOSITION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 9, 2021

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and Light Company.)	

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Inc.)	

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4928.148 for Duke Energy Ohio, Inc. the)	
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These cases concern consumers paying over \$1 billion in utility subsidies through 2030 for two antiquated coal plants owned by the Ohio Valley Electric Corporation (“OVEC”), with one of the plants not even located in Ohio.¹ Ohio electric utilities own 57.37% of OVEC (AEP –

¹ H.B. 351, Public Utilities Committee, Second Hearing, Testimony of Kim Boyko at 3 (Sept. 29, 2021).

43.47%, Duke – 9% and AES – 4.9%).² Codifying these OVEC subsidies was a key part of H.B.

6 (“likely the largest bribery, money-laundering scheme ever perpetrated against the people in the state of Ohio,” according to former U.S. Attorney David DeVillers).³

The Public Utilities Commission of Ohio (“PUCO”) hired auditors in these cases to investigate whether OVEC’s charges are reasonable.⁴ The auditors investigated issues such as: how OVEC bills utilities;⁵ how OVEC operates its coal plants and bids the output into the PJM Day-Ahead Energy Market;⁶ OVEC’s environmental compliance spending;⁷ and OVEC’s capital budgeting process.⁸ OVEC has this information. The Office of the Ohio Consumers’ Counsel (“OCC”) needs this information from OVEC to determine whether any of OVEC’s charges are reasonable.

To protect consumers, OCC moves the PUCO to issue a subpoena *duces tecum* to OVEC to designate a person(s) with knowledge and expertise on various matters to appear at deposition and bring documents as described in OCC’s memorandum in support.

OCC will be flexible as to the time, date and place of the deposition.

² Ohio Valley Electric Corporation Annual Report - 2020 at 1. American Electric Power Company, Inc. owns 39.17% and Ohio Power Company owns 4.3% of OVEC’s stock. Under the Inter-Company Power Agreement, Ohio Power Company is responsible for 19.93% of OVEC’s costs and is entitled to 19.93% of the output from the OVEC plants.

³ Pelzer, J., *Ohio House Speaker Larry Householder, allies got more than \$60 million in FirstEnergy bribes to pass HB6, feds claim* Cleveland.com (July 21, 2020).

⁴ See, e.g., *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 & 18-1759-EL-RDR, Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 4 (Jan. 15, 2020); *In the Matter of the OVEC Generation Purchase Rider Audits Required by R.C. 4928.148 for Duke Energy Ohio, Inc., The Dayton Power and Light Company, and AEP Ohio*, Case No. 21-477-EL-RDR, Entry (May 5, 2021).

⁵ See, e.g., *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 & 18-1759-EL-RDR, Audit Report at 27-30 (Sept. 16, 2020).

⁶ *Id.* at 31 and 39-53.

⁷ *Id.* at 79-88.

⁸ *Id.* at 90-96.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The OVEC subsidies are a thorn in the side for Ohio consumers. OVEC owns and operates two 1950's-era coal plants. The Ohio utilities are responsible for 33.83 of OVEC's costs and are entitled to the same share of OVEC's output (Ohio Power – 19.93%, Duke – 9% and DP&L 4.9%.⁹ The OVEC plants' outdated technology is highly inefficient, so their cost to produce electricity greatly exceeds the PJM market price for electricity. Unfortunately, the PUCO and the Ohio Legislature lavished generous subsidies on the utilities by forcing consumers to pay these above-

⁹ See footnote 2, *supra*.

market costs, which could total an additional subsidy of over \$1 billion by 2030.¹⁰ In 2019 alone, OVEC charged its utility owners \$237 million in above-market electricity costs that the utilities passed along to consumers.¹¹

These cases involve many operational and financial issues relating to OVEC's coal plants. These issues include, but are not limited to, how OVEC bills utilities;¹² how OVEC operates its coal plants and bids the output into the PJM Day-Ahead Energy Market;¹³ how OVEC manages its environmental compliance;¹⁴ and how OVEC budgets for capital improvements.¹⁵ OVEC has this information and OCC needs to review it to determine whether OVEC's costs in the best interests of consumers. The information is relevant and reasonably calculated to lead to the discovery of admissible evidence and is therefore discoverable.¹⁶

When FirstEnergy Solutions asked the Bankruptcy Court for permission to cancel the OVEC contract, it described the contract as a "very significant financial burden."¹⁷ The PUCO should closely scrutinize whether the OVEC plants were operated prudently before requiring consumers to pay this "very significant financial burden." In this regard, the PUCO should grant OCC's motion for subpoena.

¹⁰ See footnote 1, *supra*.

¹¹ *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Testimony of Devi Glick at 17, Table 2 (Oct. 26, 2021).

¹² See, e.g., *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 & 18-1759-EL-RDR, Audit Report at 27-30 (Sept. 16, 2020).

¹³ *Id.* at 31 and 39-53.

¹⁴ *Id.* at 79-88.

¹⁵ *Id.* at 90-96.

¹⁶ O.A.C. 4901-1-16(B) (Emphasis added).

¹⁷ *In re FirstEnergy Solutions Bankruptcy*, Case No. 18-50757, Declaration of Kevin T. Wardell at 8 (N.D. Ohio Bankr. Ct.) (Apr. 1, 2018).

II. LAW AND ARGUMENT

A. Issuing subpoenas to facilitate parties' discovery is within the PUCO's authority where, as here, the subpoenas seek information reasonably calculated to lead to the discovery of admissible evidence.

The PUCO's subpoena power, which facilitates parties' ability to conduct discovery, is grounded in Ohio law and rules. Attorney examiners are authorized to issue subpoenas.¹⁸ "A party may *** in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested"¹⁹ and "[a] subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code."²⁰

The scope of discovery is defined as follows:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the sought would be inadmissible at the hearing if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence.²¹

The PUCO rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.²²

¹⁸ R.C. 4901.18.

¹⁹ O.A.C. 4901-1-21(F).

²⁰ O.A.C. 4901-1-25.

²¹ O.A.C. 4901-1-16(B) (Emphasis added).

²² *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

Under this standard, there are more than adequate grounds for granting OCC's Motion in the interest of consumer protection. The documents OCC seeks relate to OVEC's operations and finances, and directly impact OVEC's costs, which the utilities collect from consumers. All of these documents are reasonably calculated to lead to the discovery of admissible evidence, as explained below.

B. Under O.A.C. 4901-1-25, OCC is entitled to seek a subpoena *duces tecum* to command a designated representative(s) of OVEC to attend and give testimony at deposition.

When allowing the utilities to collect OVEC costs, the PUCO required periodic reviews where OVEC's costs would be subject to "rigorous review"²³ to determine whether OVEC and the utilities acted "in the best interest of retail ratepayers" and acting according to the same standards as a competitive merchant operator regarding how the plants are committed into the PJM market.²⁴ In order to conduct this "rigorous review," a designated representative(s) of OVEC is needed to provide certain information that cannot be obtained from the utilities.

OVEC is a public utility subject to the PUCO's jurisdiction.²⁵ Parties have subpoenaed OVEC in other cases where OVEC had relevant information.²⁶ The PUCO should also allow OCC to subpoena OVEC under the circumstances of these cases.

²³ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Joint Stipulation and Recommendation at 7 (Dec. 14, 2015).

²⁴ *Id.* (Opinion & Order at 89) (Mar. 31, 2016).

²⁵ See, e.g., *In the Matter of the Application of the Ohio Valley Electric Corporation for authority to issue evidence of indebtedness, in the form of long-term securities, to refinance financing arrangements relating to term loans and bonds issued by the Ohio Air Quality Development Authority and the Indiana Finance Authority, to provide credit enhancements, and to enter into interest management agreements*, Case No. 21-642-EL-AIS, Application and Statement (May 21, 2021).

²⁶ See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Sierra Club's Motion for a Subpoena Duces Tecum to Ohio Valley Electric Corporation (May 22, 2018).

OVEC employees prepare the financial forecasts that project whether OVEC's costs will exceed PJM market prices. OVEC employees made the daily unit commitment decisions into the PJM Day-Ahead Energy Market. OVEC employees decide on the environmental compliance strategies to keep the plants in compliance with EPA operating permits. OVEC employees prepare the capital budgets that estimate how much spending will be needed for environmental improvements.

OCC is entitled to examine an OVEC representative(s) on these matters, instead of being forced to rely on an auditors' account or the utilities' accounts of what the OVEC employees did. In addition, in response to OCC's discovery requests, the utilities have claimed at times to have no information on various issues, such as the environmental compliance investments needed to keep the plants running.²⁷

OCC therefore seeks a subpoena from a designated representative(s) of OVEC to testify at a discovery deposition and to bring certain documents on the following topics:

- OVEC's financial forecast of its costs per MWh.
- OVEC's financial forecast of future PJM revenues.
- OVEC's billings to utility owners and the amounts collected by OVEC for non-energy costs, such as debt service and a return on equity.
- How OVEC employees commit the plants into the PJM Day-Ahead Energy Market.
- OVEC's operating policy on running its plants when OVEC's costs exceed market prices.
- What investments OVEC has made to date and will make for compliance with U.S. EPA regulations on coal combustion residuals and effluent limitation guidelines; the total cost of the investments; and the expected impact on OVEC's operating cost per MWh.

²⁷ *In the Matter of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Duke Energy responses to OCC INT-04-006 & -007.

- A copy of any notice that OVEC provided to the EPA or Ohio EPA that was required by October 13, 2021 regarding whether OVEC will comply with the generally applicable limits, the VIP limits, or whether OVEC will enroll in one of the subcategories established by the 2020 Steam Electric Effluent Limitation Guideline Reconsideration Rule.
- What investments OVEC has made to date and will make for compliance with two initiatives recently announced by President Biden: (1) on January 27, 2021, President Biden signed an Executive Order entitled: ““Tackling the Climate Crisis at Home and Abroad.””²⁸ The Executive Order provides for the U.S. to re-join the Paris Agreement of December 12, 2015 and to eliminate federal subsidies for fossil fuels;²⁹ and (2) on April 22, 2021, President Biden established a new target calling for a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030.³⁰ OCC seeks information from OVEC about the impact these initiatives will have on OVEC’s revenues and operating costs, including per MWh cost.
- What analysis was performed as to whether to make any of the capital expenditures described above or, in the alternative, to retire the plants.
- Whether OVEC has performed any studies for seasonal operation.

These are all relevant areas to whether the OVEC plants were operated prudently, as shown by an analysis of the audit report. For example, the Duke/OVEC audit report contains a lengthy section coverings environmental compliance issues and capital investment plans.³¹ The expected retirement date will impact how long the plants will remain in operation to cover the costs for environmental compliance investments. The audit report also discusses OVEC’s practices for committing the plants into the PJM Day-Ahead Energy Market.³² The auditor’s

²⁸ 86 FR 7619 (Feb. 1, 2021).

²⁹ *Id.*

³⁰ The White House, *Fact sheet: President Biden sets 2030 greenhouse gas pollution reduction target aimed at creating good-paying union jobs and securing U.S. leadership on clean energy technologies* (Apr. 22, 2021).

³¹ *In the Matter of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Audit of the Price Stabilization Rider of Duke Energy Ohio Final Report Public Version Prepared for Public Utilities Commission of Ohio at 77-90 (Oct. 21, 2020).

³² *Id.* at 38-55.

extended discussion of these topics in the audit report demonstrate that these topics are relevant to whether the plants were operated prudently; hence, OCC is entitled to subpoena a designated representative(s) of OVEC to testify on these topics.

III. CONCLUSION

OCC respectfully requests the PUCO grant this motion for the reasons discussed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Motion for Subpoena Duces Tecum was served upon the persons listed below by electronic transmission this 9th day of November 2021.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Michael DeWine
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PUBLIC UTILITIES COMMISSION OF OHIO
SUBPOENA DUCES TECUM

PUCO

2021 NOV -9 PM 12:07

RECEIVED - CIVIL DIVISION

TO: Ohio Valley Electric Corporation
c/o Statutory Agent
The Prentice-Hall Corporation System, Inc.
50 West Broad Street
Suite 1330
Columbus, Ohio 43215

Upon application of the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Valley Electric Corporation is hereby required to produce a designated representative to testify on the subject areas listed below and to produce a copy of the documents listed below at a deposition on December 15, 2021, at 10:00 a.m., at the offices of the Office of the Ohio Consumers' Counsel, 65 E. State Street, 7th Floor, Columbus, Ohio 43215-3793. The deposition is for cases pending before the PUCO styled: *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR; *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019*, Case No. 18-1759-EL-RDR; *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Case No. 20-165-EL-RDR; *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR; and *In the Matter of the OVEC Generation Purchase Rider Audits Required by R.C. 4928.148 for Duke Energy Ohio, Inc., the Dayton Power and Light*

Company, and AEP Ohio, Case No. 21-477-EL-RDR. The deposition will commence on December 15, 2021 at 10:00 a.m. and continue day-to-day until completed.

The Ohio Valley Electric Corporation is directed to produce a witness or witnesses with knowledge of the following subject areas and to produce a copy of the documents listed below. The documents are requested to be produced at least 24 hours prior to the deposition.

Documents to be produced:

- A copy of the minutes of all OVEC Board of Director meetings for 2018 through the present date.
- A copy of any report prepared during 2019 or 2020 comparing OVEC's costs to PJM market prices on a monthly or annual basis.
- A copy of any OVEC financial forecast prepared during 2020 or 2021 of OVEC's costs per MWh.
- A copy of any OVEC financial forecast prepared during 2020 or 2021 of future PJM energy and capacity prices.
- A copy of any OVEC financial forecast prepared during 2020 or 2021 of the annual amounts of electricity it expects to sell in the PJM Day-Ahead Energy Market.
- A copy of any OVEC financial forecast prepared during 2020 or 2021 comparing OVEC's costs to PJM market prices on a monthly or annual basis.
- A copy of the total amount of OVEC's billings to Duke, AEP and AES for non-energy costs (such as debt service and a return on equity) for each year in 2018, 2019 and 2020.
- A copy of any written policy in effect from January 1, 2019 through the present date that governs how OVEC employees commit the plants into the PJM Day-Ahead Energy Market.
- A copy of any written policy in effect from January 1, 2019 through the present date that governs whether OVEC will run its own plants when OVEC's costs exceed market prices.
- The amount of OVEC's investments to date and planned in the future for compliance with U.S. EPA regulations on Coal Combustion Residuals and Effluent

Limitation Guidelines; the total cost of the investments; and the expected impact on OVEC's operating cost per MWh.

- A copy of any OVEC corporate resolution prepared at any time from January 1, 2019 through the present date approving OVEC's investments for compliance with U.S. EPA regulations on Coal Combustion Residuals and Effluent Limitation Guidelines.
- A copy of any notice that OVEC provided to the EPA or Ohio EPA that was required by October 13, 2021 regarding whether OVEC will comply with the generally applicable limits, the VIP limits, or whether OVEC will enroll in one of the subcategories established by the 2020 Steam Electric Effluent Limitation Guideline Reconsideration Rule.
- A copy of the amount of OVEC's investments to date and planned in the future for compliance with two initiatives recently announced by President Biden: (1) on January 27, 2021, President Biden signed an Executive Order entitled: "'Tackling the Climate Crisis at Home and Abroad.'" ¹ The Executive Order provides for the U.S. to re-join the Paris Agreement of December 12, 2015 and to eliminate federal subsidies for fossil fuels, ² and (2) on April 22, 2021, President Biden established a new target calling for a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030. ³ OCC seeks information from OVEC about the impact these initiatives will have on OVEC's revenues and operating costs, including per MWh cost.
- A copy of any analysis that was performed as to whether to make any of the capital expenditures for environmental compliance with CCR or ELG rules or President Biden's executive orders described above or, in the alternative, to retire the plants.
- A copy of any analysis of changing to seasonal operation for either of the coal plants.

Dated at Columbus, Ohio, this 9th day of November 2021.



Attorney Examiner

¹ 86 FR 7619 (Feb. 1, 2021).

² *Id.*

³ The White House, *Fact sheet: President Biden sets 2030 greenhouse gas pollution reduction target aimed at creating good-paying union jobs and securing U.S. leadership on clean energy technologies* (Apr. 22, 2021).

NOTICE: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

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**Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR, 20-0165-EL-RDR, 20-0167-EL-
RDR, 21-0477-EL-RDR**

Summary: Motion Motion for Subpoena Duces Tecum for Designated
Representative of Ohio Valley Electric Corporation to Attend and Testify at
Deposition by Office of the Ohio Consumers' Counsel electronically filed by Ms.
Deb J. Bingham on behalf of Finnigan, John