

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION OF
THE DAYTON POWER AND LIGHT COMPANY
TO QUASH SUBPOENA WITHOUT PREJUDICE,
AND MEMORANDA CONTRA TO MOTION FOR SUBPOENA DUCES TECUM**

The Dayton Power and Light Company d/b/a AES Ohio (“AES Ohio”), pursuant to Ohio Administrative Code (“OAC”) 4901-1-12, in this Case No. 20-165-EL-RDR hereby moves in this proceeding to quash the Subpoena served by the Ohio Office of the Consumers’ Counsel (“OCC”) on November 9, 2021, and submits its memorandum contra to the related motion filed by OCC for a Subpoena Duces Tecum. AES Ohio notes that OCC filed the same motion and Subpoena in Case No. 21-477-EL-RDR, and a separate pleading will address that proceeding.

AES Ohio submits that OCC’s Motion and Subpoena are both premature and seek information that is not within the scope of this particular case. Significantly, Case No. 20-165-EL-RDR has never been set for evidentiary hearing. Thus, depositions and other discovery methods cannot fulfill the essential element justifying discovery: the development of relevant evidence. OCC’s Subpoena should be quashed on that basis only, subject to possible reinstatement if Case No. 20-165-EL-RDR is set for evidentiary hearings.

To provide further context, AES Ohio notes that it has already provided to OCC, on a voluntary basis, a vast amount of material. AES Ohio has already provided to OCC all the documents and responses that it submitted to the PUCO’s auditor in response to the comprehensive audit performed by that auditor. Additionally, AES Ohio has already voluntarily provided OCC with responses to multiple rounds of interrogatories and document requests. In

light of AES Ohio's voluntary submissions in a case that has not been set for evidentiary hearings, the OCC motion and Subpoena can fairly be characterized as both abusive and premature.

Additionally, Case No. 20-165-EL-RDR is limited to a review of years 2018 and 2019, prior to the new rider that was implemented and effective January 1, 2020 after statutory amendments were enacted into law.¹ The OCC motion and Subpoena are overly broad in seeking information for years 2020 and 2021 that are outside the scope of this docket. Moreover, the documentary information relating to 2018 and 2019 that is sought has already been provided to OCC or, alternatively, does not exist or is irrelevant. OCC should not be permitted to compel deposition testimony or documentary discovery in this proceeding with respect to years that are outside the scope of the proceeding. Nor should OCC be permitted to seek, again, documents that have already been provided.

The Subpoena should be quashed at this time, subject to renewal only if this proceeding is set for evidentiary proceedings and, if renewed at that time, limited in scope to the audit years 2018 and 2019, and further limited to requests for documents not already in OCC's possession.

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND
MEMORANDUM CONTRA TO OCC MOTION AND**

I. OCC's SUBPOENA SHOULD BE QUASHED AS PREMATURE AND ITS MOTION REJECTED AS INCAPABLE OF DEVELOPING RELEVANT EVIDENCE BECAUSE THERE IS NO EVIDENTIARY PROCEEDING.

OCC's Subpoena starts on the wrong foot by treating multiple different cases, involving three different Ohio utilities, as if they were identical. OCC previously sought and later

¹ *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Case No. 20-165-EL-RDR, Entry ¶ 9, Jan. 29, 2020; *see also* discussion *id.* at ¶¶6-8 of the new rider made effective Jan. 1, 2020, and filed in different cases.

withdrew a motion to consolidate cases involving American Electric Power (“AEP”) utilities and Duke Energy Ohio (“Duke”).² This case involving AES Ohio, however, was not even included in that consolidation motion – and for good reason. Unlike the AEP and Duke cases, this case has never been set for evidentiary hearings.

It is black-letter law that the PUCO has the lawful authority to determine what is and is not appropriate discovery at any particular stage of this proceeding. In proceedings in which no hearing is required, the Commission has “discretion [as to] whether to allow discovery, depositions and testimony.” *In the Matter of the Joint Application of Spring Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry on Rehearing ¶ 9 (Jan. 25, 2006).

This case has its own unique procedural schedule with established deadlines for an audit to be performed by an independent outside auditor, an audit report to be issued, and for the receipt of comments and reply comments by interested entities, including OCC.³ All of those steps have been completed and there is no evidentiary hearing scheduled that would justify OCC’s requested Subpoena to compel discovery, which has as its fundamental purpose the development of relevant evidence.

The Commission established this proceeding so that an outside auditor could examine AES Ohio’s books and records and to prepare a report.⁴ That has ¶ occurred. An Entry by the

² Compare OCC Motion to Consolidate filed July 8, 2021 in Case Nos. 18-1004-EL-RDR (AEP), 18-1759-EL-RDR (AEP) and 20-167-EL-RDR (Duke) with Entry of Oct. 5, 2021 establishing a separate evidentiary hearing for the AEP cases and Entry of Aug. 25 2021, establishing a separate evidentiary hearing for the Duke case and noting (at ¶ 12) OCC’s withdrawal of its motion to consolidate.

³ *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Co.*, Case No. 20-165-EL-RDR, Entry at ¶ 16, Nov. 30, 2020.

⁴ *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Co.*, Case No. 20-165-EL-RDR, Entry, Jan. 29, 2020.

Attorney Examiner has permitted comments to be filed, which has also occurred.⁵ But this case has not been set for evidentiary hearings. In the absence of that, a deposition is premature – it cannot produce probative relevant evidence for use in an evidentiary hearing.

If there is no evidentiary hearing, there can be no relevant evidence to be developed as a result of the Subpoena. The Subpoena should be quashed, without prejudice, unless and until an Entry is issued to establish evidentiary hearings. Thus, no deposition should be scheduled of an OVEC witness. Additionally, while AES Ohio has been willing to provide a sizable trove of documents on a voluntarily basis, absent an evidentiary hearing process, there should be no compelled additional discovery and no additional documents should be required to be produced.

II. OCC's SUBPOENA SHOULD BE QUASHED, AND ITS MOTION SHOULD BE DENIED WITH RESPECT TO ITS SEEKING THE PRODUCTION OF DOCUMENTS FOR YEARS OUTSIDE THE SCOPE OF THIS PROCEEDING AND TO THE EXTENT PREVIOUSLY PROVIDED.

The Subpoena Duces Tecum lists 15 categories of documents sought by OCC. Seven of those categories are explicitly seeking documents from only 2020 or later. These seven requests should be summarily rejected. And with respect to the other requests that include years both in and out of scope, AES Ohio submits that all fall into one of two categories: 1) already provided with respect to the audit period of 2018-2019; or 2) non-existent. Thus, the entire Subpoena Duces Tecum should be rejected as not seeking information that is reasonably expected to result in relevant evidence.

AES Ohio has already provided to OCC all the documents and responses that were submitted to the PUCO's auditor in response to the comprehensive audit performed by that

⁵ *Id.*, Entry at ¶16, Nov. 30, 2020.

auditor. Additionally, AES Ohio has already voluntarily provided OCC with responses to additional interrogatories and document requests made by OCC.

The Table below addresses each of OCC's demands set forth in the Subpoena Duces Tecum individually.

OCC Request	Out of Scope	Additional AES Ohio Response
A copy of the minutes of all OVEC Board of Director meetings for 2018 through the present date.	Out of scope for 2020-2021	Overly broad and irrelevant. Relevant decisions regarding operations of the plants are made at by the Operating Committee. For the audit period, Operating Committee minutes were provided to the Auditor in response to Data Request VEC-DR 64, and then to OCC.
A copy of any report prepared during 2019 or 2020 comparing OVEC's costs to PJM market prices on a monthly or annual basis.	Out of scope for 2020	The Audit Report, Exhibit II-2, p. 17, quantified month by month for the audit period, OVEC costs charged to AES Ohio and revenues received via PJM markets.
A copy of any OVEC financial forecast prepared during 2020 or 2021 of OVEC's costs per MWh.	Out of scope	
A copy of any OVEC financial forecast prepared during 2020 or 2021 of future PJM energy and capacity prices.	Out of scope	
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.	Out of scope	
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.	Out of scope	
A copy of the total amount of	Out of scope for 2020	For the audit period, workpapers

OVEC's billings to Duke, AEP and AES for nonenergy costs (such as debt service and a return on equity) for each year in 2018, 2019 and 2020.		and journal entries showing all OVEC charges to AES Ohio were provided to the Auditor in response to VEC-DR 05 and then to OCC.
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	Out of scope for 2020-2021	Procedures used by OVEC to check availability of units and to govern bidding procedures into PJM were provided to the Auditor in response to VEC-DR 9, and then to OCC. Additional operating procedures provided to OCC on 2-22-2021.
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.	Out of scope for 2020-2021	To AES Ohio's belief and information, there are no operating policies in effect during the audit period other than those provided and referenced above. An interrogatory response regarding must-run status of the units was provided in response to VEC-DR 20 and then to OCC.
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.	Out of scope for 2020-2021	A list of capital investments made in the audit period including for environmental compliance, was provided to Auditor in response to VEC- DR 39 and then to OCC.
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.	Out of scope for 2020-2021	To AES Ohio's belief and understanding, no such resolutions were prepared during the audit period.
A copy of any notice that	Out of scope	

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."" 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.; 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. OCC seeks information from OVEC about the impact these initiatives will have on OVEC's revenues and operating costs, including per MWh cost.	Out of scope	
A copy of any analysis that was performed as to whether to make any of the capital expenditures for environmental compliance	Out of scope	

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.	Out of scope for 2020-2021	To AES Ohio's belief and understanding, no such analysis was created during the audit period or earlier.

To the extent, OCC seeks additional information with respect to those interrogatories and document requests that is within the scope of the audit, AES Ohio remains willing to respond to reasonable follow-up interrogatories and document requests. There is no need for a deposition or to issue a Subpoena to obtain the information that OCC seeks that is relevant to 2018 or 2019.

Moreover, as previously noted, this proceeding is not currently established as an evidentiary, adversarial proceeding. The Commission established this proceeding so that an outside auditor could examine AES Ohio's books and records and to prepare a report.⁶ That has occurred. An Entry by the Attorney Examiner has permitted comments to be filed, which has also occurred.⁷ But this case has not been set for evidentiary hearings. In the absence of that, a demand for a deposition or for additional documents is premature – it cannot produce probative relevant evidence for use in an evidentiary hearing.

Conclusion.

AES Ohio respectfully moves that OCC's Subpoena be quashed at this time and that its motion be rejected, without prejudice. OCC may choose to renew its requests if this proceeding becomes set for evidentiary hearings and if OCC determines that the information it seeks for the audit period, 2018 and 2019, is not already in its possession.

⁶ *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Co.*, Case No. 20-165-EL-RDR, Entry, Jan. 29, 2020.

⁷ *Id.*, Entry at ¶ 16, Nov. 30, 2020.

Respectfully submitted,

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November 19, 2021

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was served via electronic transmission upon the following parties of record this 19th day of November 2021.

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Summary: Motion and Memorandum to Quash Subpoena and Memorandum
Contra to OCC Motion electronically filed by Mr. Randall V Griffin on behalf of The
Dayton Power and Light Company