

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

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On November 9, 2021, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a motion to subpoena the Ohio Valley Electric Corporation (“OVEC”) to appear at a discovery deposition. DP&L – an ungrateful recipient of corporate welfare that it collects from consumers for outmoded and polluting OVEC coal plants – wants the PUCO to prevent Ohio’s consumer advocate from inquiring into those subsidies. On November 19, 2021, DP&L filed to quash OCC’s subpoena to depose OVEC. But DP&L’s bargain for its privilege of serving consumers as an electric monopoly is the state’s regulation of its charges. And former Chair Haque wrote that “[t]his should not be perceived as a blank check, and consumers should not be treated like a trust account”¹ OCC is exercising its right under R.C. 4903.082 to conduct discovery in the regulatory process that goes with DP&L’s monopoly. The Supreme Court recently upheld OCC’s discovery rights in reversing the PUCO’s violation of that right in the FirstEnergy Advisors case.²

¹ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement*, Case No. 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p.5 (Mar. 31, 2016).

² *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630, 2021 Ohio LEXIS 2065, 2021 WL 4783198.

As background, the PUCO required DP&L's customers (at DP&L's request) to subsidize electricity from two outdated, uneconomic coal power plants that are polluting the planet, as operated by OVEC. The utilities then apparently used their influence to convince the legislature to codify the subsidy in scandal-ridden House Bill 6. PUCO audits of the OVEC charges (that are paid by utility consumers to DP&L, AEP Ohio, and Duke) confirmed that "the OVEC plants cost more than they earn."³ It's a bad deal for consumers paying the subsidies.

As we have found through the years, those like DP&L who feed at the public trough can display a sense of entitlement to their corporate welfare. Instead of an open-book approach to its utility costs and charges, DP&L seeks to quash OCC's subpoena and avoid state scrutiny. That is DP&L's approach despite its status as a regulated monopoly utility, its charges for millions of dollars in corporate welfare, and the ample discovery rights guaranteed under Ohio law, PUCO rules and PUCO precedent.⁴

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.⁵ And they're "intended to minimize commission intervention in the discovery process."⁶

³ *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 London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 31 (Sept. 16, 2020).

⁴ 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.").

⁵ O.A.C. 4901-1-16(A).

⁶ *Id.*

Here, the PUCO conducted annual audits of the charges to consumers for the coal power plant subsidies. Parties may consider any subsidy charge for these coal plants to be unreasonable and anti-competitive for consumers to pay. It is OCC's right under law to do so.

The use of discovery especially is important in this case. That's because, incredibly, the report of the PUCO-hired auditor (Vantage Energy Consulting) was filed without an analysis of OVEC's committing of the coal plants into the PJM day ahead energy market as must-run (versus economic). The analysis was needed because the plants tend to lose money for consumers when they run. But despite the potential to lose money (meaning consumers' money, thanks to the PUCO's approval of the subsidy), the utilities and OVEC had them running a lot. The auditor in the AEP and Duke cases addressed this consumer issue, but not so for DP&L consumers.⁷

In the audit for protecting AEP's consumers, the auditor noted that OVEC continued running the plants on days when the plants earned less revenue from selling electricity than the plants' variable operating costs.⁸ Accordingly, the PUCO auditor in the AEP case recommended that OVEC reconsider its must-run offer strategy that caused these losses.⁹

OCC's need for discovery is also prompted by a recent Michigan Public Service Commission ("MPSC") order involving Indiana Michigan Power Company's (an AEP affiliate) fuel adjustment clause case, which included costs from the OVEC plants (Indiana Michigan receives 7.85% of OVEC's output under the Inter-Company Power Agreement). In that case, the

⁷ *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 London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 9 (Sept. 16, 2020); *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR London Economics International, LLC, Audit of the OVEC Power Purchase Agreement Rider of Ohio Power Company at 10 (Oct. 15, 2020).

⁸ *Id.* at 9.

⁹ *Id.*

MPSC reviewed several forecasts showing the OVEC's costs for energy and capacity will exceed PJM market prices; therefore, the MPSC issued the following warning:

The company is put on notice that the Commission is unlikely to permit the utility to recover these uneconomic costs from its customers in rates, rate schedules, or PSCR factors established in the future without good faith efforts to manage existing contracts such as meaningful attempts to renegotiate contract provisions to ensure continued value for ratepayers.¹⁰

OCC needs to obtain discovery on this issue of what, if anything, Indiana Michigan and the other OVEC owners like DP&L are doing to “renegotiate contract provisions to ensure continued value for ratepayers.”

DP&L's motion to quash OCC's subpoena and the consumer protection it represents should be denied.

II. LAW AND ARGUMENT

A. The PUCO should deny DP&L's motion to quash because DP&L failed to demonstrate that the subpoena is “unreasonable or oppressive.”

A person who receives a subpoena may seek to quash it if the subpoena is “unreasonable or oppressive.”¹¹ DP&L cannot demonstrate that the subpoena is unreasonable or oppressive because the deposition does not require DP&L to do anything. OCC's subpoena asks OVEC, not DP&L, to appear at deposition and produce documents. The PUCO should dismiss DP&L's motion to quash because DP&L cannot demonstrate that the subpoena is unreasonable or oppressive.

¹⁰ *In the Matter of the Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the Twelve Months Ending December 31, 2021*, Case No. U-20804, Order at 20 (Mich. Pub. Serv. Comm.) (Nov. 18, 2021).

¹¹ O.A.C. 4901-1-25(C).

Further, the subpoena is an entirely reasonable and ordinary use of discovery. OCC has a clear right to conduct discovery “to facilitate thorough and adequate preparation in commission proceedings” and under R.C. 4903.082.¹² DP&L wants the PUCO to tilt the justice system toward it and away from consumers, where consumers are denied the opportunity to present relevant information to the PUCO. DP&L is taking a page from FirstEnergy Advisors’ recent playbook. The PUCO should deny a motion to quash when, as in this case, the party seeking to “quash” a deposition has not provided any specific grounds to establish that the deposition would be unreasonable or oppressive. Those grounds are required to be shown, under O.A.C. 4901-1-25(C).

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

OCC reasonably concluded that, for consumer protection, a deposition is an appropriate tool for investigating the reasonableness of OVEC costs collected by DP&L and the other Ohio utilities. This is OCC’s choice to make.

Consumers paid the costs for two coal plants owned and operated by OVEC. OVEC has relevant information on the reasonableness of such costs. This discovery goes to whether OVEC and the Ohio utilities acted prudently and in the best interests of its customers in its management of OVEC costs — the stated purpose of this audit.¹³ This type of complex issue is appropriately explored in a deposition, where a witness can be asked to explain the details involved.

¹² O.A.C. 4901-1-16(A).

¹³ “The Commission selects Vantage Energy Consulting, LLC to conduct the audit services necessary to assist the Commission in **the prudence and performance audit** of the Dayton Power and Light Company’s reconciliation rider for the period of November 1, 2018 through December 31, 2019.” Entry at ¶ 1 (Mar. 11, 2020) (emphasis added).

Depositions are considered an important tool in an attorney's case preparation. They can 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 explain why DP&L wants the PUCO to prevent OCC and other parties from taking depositions. But again, the conducting of discovery and the form of discovery is the intervenor's choice to make, under Ohio law and rule. DP&L's motion to quash should therefore be denied.

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

In the present case, DP&L argues that OCC should not be permitted to take a deposition from OVEC to investigate the complex issues in this case because DP&L has already produced documents to OCC.¹⁴ In doing so, DP&L improperly seeks to control OVEC's choice of discovery methods.

Each method has distinct advantages and disadvantages. For example, depositions provide intervenors with an opportunity for spontaneous, direct contact with the deponent and the immediate ability to ask clarifying or follow-up questions.¹⁵ 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.

Moreover, the Ohio Administrative Code leaves case preparation to the parties, per O.A.C. 4901-1-16(A). OCC has the right to prepare its own case using the discovery tools it

¹⁴ Motion to Quash at 4-5.

¹⁵ § 38:2. Advantages and disadvantages of depositions, 5 Ohio Jur. Pl. & Pr. Forms § 38:2 (2018 ed.).

chooses, not the ones that DP&L would like to choose for OCC to hinder our consumer advocacy. DP&L is wasting the parties' time and the PUCO's time with its obstruction.

In addition to glossing over fundamental differences between discovery methods, DP&L's argument defies PUCO precedent. The PUCO has 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."¹⁶

Furthermore, in this case, OCC used written discovery requests to investigate complex issues, but DP&L objected. For example, in response to OCC's written requests, 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. ¹⁷

Now that OCC and others seek a deposition to investigate complex issues, as a response to DP&L's objection to OCC's written discovery, DP&L attempts to whipsaw OCC by arguing

¹⁶ *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 (Aug. 4, 1980).

¹⁷ *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).

that OCC should not be permitted to obtain a deposition from OVEC either. It should not be difficult for the PUCO to see through DP&L's shallow arguments and to understand that DP&L's tactic is to prevent or delay OCC's consumer advocacy. That is unlawful.

DP&L's objections are inconsistent with the PUCO's objective (and the Ohio Supreme Court's determination) that parties shall have broad rights to discovery "to facilitate thorough and adequate preparation for participation in commission proceedings."¹⁸ That is exactly what OCC seeks through a deposition of OVEC: discovery during the prehearing phase of the proceeding to adequately participate in the proceeding. The rule does not require that a hearing be held; it only explains the timing of the discovery.

Ohio Adm. Code 4901-1-16(B) states: "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." Under law and rule, OCC chose a deposition. That is OCC's choice to make.

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

DP&L also seeks to quash the deposition on the ground that a deposition is improper because no evidentiary hearing has been scheduled.¹⁹ The utilities have been trotting out that tired old argument for years to interpose delay. But, as previously explained, the Ohio Administrative Code does not bar the use of depositions in cases where no hearing is scheduled. To the contrary, the Code broadly provides 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

¹⁸ O.A.C. 4901-1-16(A).

¹⁹ Motion to Quash at 1.

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, DP&L is unlawfully attempting to re-write the Ohio Administrative Code rule on depositions²¹ and create a new limitation on depositions that the PUCO did not choose to include when it adopted the rule. Not even JCARR does that. In any event, intervenors are typically afforded full discovery rights, even in proceedings without scheduled hearings.²² The PUCO should therefore reject this argument.

III. CONCLUSION

The Ohio Administrative Code recognizes how important discovery is “to facilitate thorough and adequate preparation for participation in commission proceedings.”²³ R.C. 4903.082 ensures discovery rights for OCC. The Supreme Court of Ohio has admonished the PUCO that discovery is a right. OCC is exercising its right to take a deposition of OVEC. DP&L has advanced several shallow and meritless arguments for quashing a subpoena that is not even directed at DP&L. The PUCO should reject DP&L’s motion to quash the subpoena.

²⁰ O.A.C. 4901-1-21(A).

²¹ See *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 (2008) (“we cannot generally add a requirement that does not exist in the Constitution or a statute”); *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948) (“it is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom.”).

²² 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 (Mar. 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 (Mar. 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).

²³ O.A.C. 4901-1-16(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 1st day of December 2021.

/s/ John Finnigan

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