

**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 OF OHIO POWER COMPANY,
DUKE ENERGY OHIO, INC., AND
THE DAYTON POWER AND LIGHT COMPANY
TO QUASH SUBPOENA**

Pursuant to Ohio Adm.Code 4901-1-12(A) and 4901-1-25(C), Ohio Power Company (“AEP Ohio”), Duke Energy Ohio, Inc. (“Duke Energy Ohio”), and The Dayton Power and Light Company d/b/a AES Ohio (“AES Ohio”) respectfully move the Public Utilities Commission of Ohio (“Commission”) to quash the Subpoena Duces Tecum served on Ohio Valley Electric Corporation (“OVEC”) by The Office of the Ohio Consumers’ Counsel (“OCC”) and filed in the above-captioned proceedings on November 9, 2021.

The reasons supporting this motion are provided in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

On July 8, 2021, the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Manufacturers' Association Energy Group ("OMAEG") moved to consolidate the hearings in the Commission's audit proceedings for AEP Ohio's Power Purchase Agreement ("PPA") Rider and Duke Energy Ohio's Price Stabilization Rider ("PSR"). After AEP Ohio, Duke Energy Ohio, and Staff opposed the motion, OCC and OMAEG withdrew their request to consolidate those three cases. *In re the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case Nos. 18-1004-EL-RDR *et al.* ("AEP Ohio PPA Rider Audit Cases"), Reply Memorandum in Support of Joint Motion for a Consolidated Hearing to Determine Whether AEP's and Duke's OVEC Charges to Customers Were Prudent at 1 (July 30, 2021). Yet OCC has now noticed a consolidated *deposition* of a representative of the Ohio Valley Electric Corporation ("OVEC"), which OCC filed and served in each of the *five* cases captioned above.

These five cases are intended to review the prudence of the costs incurred during different time periods, through different rider mechanisms that the Commission approved pursuant to different legal authorities. The AEP Ohio audits are retrospective reviews of expenses recovered through its PPA Rider during 2018 and 2019. The Duke Energy Ohio audit is a retrospective review of costs recovered through its PSR for 2019. The AES Ohio audit is a retrospective review of costs recovered through its reconciliation rider during portions of 2018 and 2019. The consolidated audit is a retrospective review of costs recovered through the Legacy Generation Resources (LGR) Rider for 2020. The AEP Ohio, Duke Energy Ohio, and AES Ohio riders were approved as part of their respective companies' Electric Security Plans

(“ESPs”). The LGR Riders were approved under R.C. 4928.148. Yet OCC proposes to combine all of them into a single deposition, on topics beyond the actual subject of each audit.

AEP Ohio, Duke Energy Ohio, and AES Ohio jointly move to quash the subpoena on OVEC. If OCC wants to depose one or more representatives of OVEC to develop information relevant to the above-captioned proceedings, it must notice separate depositions for each set of proceedings. And no deposition of OVEC’s representative(s) may include topics that are clearly outside the scope of each proceeding, as described in the Commission’s orders.

II. The Commission should not allow OCC to consolidate the various proceedings for purposes of the OVEC deposition.

The five cases captioned above serve distinct purposes and cover distinct periods. The purpose of Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR is to review the “prudence and performance” of expenses recovered through AEP Ohio’s PPA Rider for calendar years 2018 and 2019. *AEP Ohio PPA Rider Audit Cases*, Entry ¶¶ 4, 7 (Oct. 5, 2021). The purpose of Case No. 20-165-EL-RDR is to conduct “a prudence and performance audit of [AES Ohio]’s reconciliation rider for the period of November 1, 2018, through December 31, 2019.” *In re Review of the Reconciliation Rider of The Dayton Power and Light Company*, Case No. 20-165-EL-RDR (“*AES Ohio Reconciliation Rider Audit Case*”), Entry ¶ 8 (Nov. 30, 2020). The purpose of Case No. 20-167-EL-RDR (the “*Duke Energy Ohio PSR Audit Case*”) is to review the prudence of Duke Energy Ohio’s “practices relating to liquidating its contractual entitlements under the ICPA in the wholesale market.” *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case Nos. 17-1263-EL-SSO *et al.*, Opinion and Order ¶ 138 (Dec. 19, 2018). Each of these proceedings related to a rider mechanism established as part of AEP Ohio, AES Ohio, or Duke Energy Ohio’s ESPs. The purpose of Case No. 21-477-EL-RDR, in contrast, is to “determine the prudence and reasonableness of the actions of

EDUs with ownership interests” in OVEC during calendar year 2020. *In re the OVEC Generation Purchase Rider Audits Required by R.C. 4928.148 for Duke Energy Ohio, Inc., the Dayton Power and Light Co., and AEP Ohio*, Case No. 21-477-EL-RDR (“LGR Rider Audit Case”), Entry ¶¶ 3, 5 (May 5, 2021). And unlike AEP Ohio’s PPA Rider, AES Ohio’s reconciliation rider, and Duke Energy Ohio’s PSR, the LGR Rider was set up pursuant to R.C. 4928.148. *Id.*

As indicated above, OCC and OMAEG originally moved to consolidate the hearings over AEP Ohio’s PPA Rider and Duke Energy Ohio’s PSR, as permitted by the Commission’s rules. *See Ohio Adm.Code 4901-1-02(A)(6)*. Yet OCC and OMAEG subsequently withdrew that motion to consolidate. It follows that there is no reason to permit OCC to notice a consolidated deposition for the AEP Ohio PPA Rider Audit Cases and the Duke Energy Ohio PSR Audit Case, much less the AES Ohio Reconciliation Rider Audit Case and the LGR Rider Audit Case. No provision of the Commission’s rules permits a party to notice a deposition that is to be taken in multiple, unconsolidated proceedings simultaneously. And allowing a consolidated deposition to move forward would cause inevitable procedural and evidentiary problems.

Because these proceedings relate to different electric distribution utilities, certain of the topics that OCC proposes to cover at the OVEC deposition would clearly be irrelevant to the other proceedings. For example, “the total amount of OVEC’s billings to Duke * * * for non-energy costs” (OCC Subpoena Duces Tecum at 2) would be irrelevant in the AEP Ohio and AES Ohio proceedings. As another example, questions regarding OVEC financial forecasts prepared during 2021 would be completely irrelevant to the AEP Ohio, Duke Energy Ohio, and AES Ohio audit proceedings, which relate to various specific periods during 2018 and 2019. If OCC took a consolidated deposition of OVEC’s representative(s), the transcript would be littered with

relevance objections, and counsel for the utilities would need to specify case numbers or utility names after each objection (“objection, relevance, AEP rider audits”) just to keep them straight. And if OCC attempted to introduce the transcript (either in part or in its entirety) at any of the hearings in the various proceedings, parsing those relevance objections at the various, separate hearings would be needlessly time-consuming and complicated.

If the OVEC deposition moves forward, and to the extent there are topics in OCC’s subpoena *duces tecum* that are actually relevant to each of these proceedings (*see infra*), OCC would need to schedule multiple OVEC depositions on the same day, *seriatim* – *e.g.*, one for the AEP Ohio PPA Rider Audit Cases, then one for the Duke Energy Ohio PSR Audit Case, *et cetera*.¹ In other words, if OCC is permitted to conduct *any* depositions of OVEC representatives, OCC must conduct multiple depositions, rather than one. That way, the questioning that is clearly unrelated to their audits, and the basis for relevance objections will be more clearly presented in the separate deposition transcripts.

III. The Commission should protect OVEC from testifying on matters outside the scope of each of the proceedings.

As indicated above, the rider audit proceedings cover different electric distribution utilities and different time periods. Consequently, any depositions of OVEC representatives in each of the separate depositions must be limited to the relevant electric distribution utility and audit period. OCC should not be permitted to use a self-consolidated deposition notice to circumvent the basic requirement that discovery in Commission proceedings be “relevant to the

¹ AES Ohio’s separate Motion to Quash memorandum at pp. 3-4, filed on November 19, 2021, points out a separate ground for not scheduling a deposition for Case No. 20-165-EL-RDR, *i.e.*, the purpose of discovery to develop relevant evidence would not be served because all aspects of the procedural schedule for that case have been completed and no evidentiary proceeding was ever established.

subject matter of the proceeding” or “reasonably calculated to lead to the discovery of admissible evidence.” Ohio Adm.Code 4901-1-16(B).

In an audit proceeding, generally speaking, “[t]he Commission has historically only permitted a review of matters during the audit period involved in [the] case.” *In re Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio*, Case No. 05-219-GA-GCR, Entry, ¶ 10-11 (July 28, 2006). *Cf. In re Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-101-EL-EFC, Opinion and Order, 1994 Ohio PUC LEXIS 393, *95-96 (May 25, 1994) (declining to review the appropriateness of the retirement of a specific dragline because it was “a matter outside the review period of the audits conducted in this case.”). Consequently, the Commission has not permitted discovery relating to matters outside the audit period. *See In re Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power and Light Company*, Case No. 85-07-EL-EFC, Entry, 1985 Ohio PUC LEXIS 806, *3-5 (September 3, 1985) (granting in part and denying in part a motion to compel filed by OCC, and holding that “[t]he attorney examiner * * * will not order the company to provide data outside the audit period”). And it should not permit such discovery here. Factual questions concerning OVEC’s generation, bidding, and other actions during, for example, 2019, may not be explored with the hindsight of reports produced, information received, policies developed, or rulemakings proposed in 2020 or 2021.

For any deposition in the AEP Ohio PPA Rider Audit Cases, OVEC’s representative(s) should not be required to produce any of the following documents or information that relate to other electric distribution utilities or time periods outside the 2018-2019 audit period:

- The minutes of OVEC Board of Director meetings for 2020 through the present date;
- Any report prepared during 2020 comparing OVEC's costs to PJM market prices on a monthly or annual basis;
- Any OVEC financial forecast prepared during 2020 or 2021 of OVEC's costs per MWh;
- Any OVEC financial forecast prepared during 2020 or 2021 of future PJM energy and capacity prices;
- 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;
- Any OVEC financial forecast prepared during 2020 or 2021 comparing OVEC's costs to PJM market prices on a monthly or annual basis;
- The total amount of OVEC's billings to Duke and AES for non-energy costs (such as debt service and a return on equity) for 2018, 2019, and 2020;
- The total amount of OVEC's billings to AEP Ohio for non-energy costs (such as debt service and a return on equity) for 2020;
- Any written policy in effect from January 1, 2020, through the present date that governs how OVEC employees commit the plants into the PJM Day-Ahead Energy Market;
- Any written policy in effect from January 1, 2020, 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 after December 31, 2019, or planned after December 31, 2019, 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;
- Any OVEC corporate resolution prepared at any time from January 1, 2020, through the present date approving OVEC's investments for compliance with U.S. EPA regulations on Coal Combustion Residuals and Effluent Limitation Guidelines;
- 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;
- OVEC's investments to date and planned in the future for compliance with President Biden's January 27, 2021 Executive Order entitled "Tackling the Climate Crisis at Home and Abroad" and President Biden's April 22, 2021 announcement establishing a new target calling for a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030, including information about the impact these initiatives will have on OVEC's revenues and operating costs, including per MWh cost;

- Any analysis that was performed in 2020 or 2021 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; or
- Any analysis conducted before after 2019 of changing to seasonal operation for either of the coal plants.

Similarly, for any deposition for the Duke Energy Ohio PSR Audit Case, OVEC's representative(s) should not be required to produce any of the following documents or information that relate to other electric distribution utilities or time periods outside the 2019 audit period:

- The minutes of OVEC Board of Director meetings for 2020 through the present date;
- Any report prepared during 2020 comparing OVEC's costs to PJM market prices on a monthly or annual basis;
- Any OVEC financial forecast prepared during 2020 or 2021 of OVEC's costs per MWh;
- Any OVEC financial forecast prepared during 2020 or 2021 of future PJM energy and capacity prices;
- 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;
- Any OVEC financial forecast prepared during 2020 or 2021 comparing OVEC's costs to PJM market prices on a monthly or annual basis;
- The total amount of OVEC's billings to AEP Ohio and AES for non-energy costs (such as debt service and a return on equity) for 2018, 2019, and 2020;
- The total amount of OVEC's billings to Duke Energy Ohio for non-energy costs (such as debt service and a return on equity) for 2018 and 2020;
- Any written policy in effect from January 1, 2020, through the present date that governs how OVEC employees commit the plants into the PJM Day-Ahead Energy Market;
- Any written policy in effect from January 1, 2020, 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 after December 31, 2019, or planned after December 31, 2019, 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;

- Any OVEC corporate resolution prepared at any time from January 1, 2020, through the present date approving OVEC's investments for compliance with U.S. EPA regulations on Coal Combustion Residuals and Effluent Limitation Guidelines;
- 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;
- OVEC's investments to date and planned in the future for compliance with President Biden's January 27, 2021 Executive Order entitled "Tackling the Climate Crisis at Home and Abroad" and President Biden's April 22, 2021 announcement establishing a new target calling for a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030, including information about the impact these initiatives will have on OVEC's revenues and operating costs, including per MWh cost;
- Any analysis that was performed in 2020 or 2021 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; or
- Any analysis conducted after 2019 of changing to seasonal operation for either of the coal plants.

And for any deposition for the LGR Rider Audit Case, OVEC's representative(s) should not be required to produce any of the following documents or information that relate to time periods outside the 2020 audit period:

- The minutes of OVEC Board of Director meetings for 2021;
- Any OVEC financial forecast prepared during 2021 of OVEC's costs per MWh;
- Any OVEC financial forecast prepared during 2021 of future PJM energy and capacity prices;
- Any OVEC financial forecast prepared during 2021 of the annual amounts of electricity it expects to sell in the PJM Day-Ahead Energy Market;
- Any OVEC financial forecast prepared during 2021 comparing OVEC's costs to PJM market prices on a monthly or annual basis;
- Any written policy in effect in 2021 that governs how OVEC employees commit the plants into the PJM Day-Ahead Energy Market;
- Any written policy in effect in 2021 that governs whether OVEC will run its own plants when OVEC's costs exceed market prices;

- The amount of OVEC’s investments in 2021, or planned after December 31, 2020, 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;
- Any OVEC corporate resolution prepared in 2021 approving OVEC’s investments for compliance with U.S. EPA regulations on Coal Combustion Residuals and Effluent Limitation Guidelines;
- 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;
- OVEC’s investments to date and planned in the future for compliance with President Biden’s January 27, 2021 Executive Order entitled “Tackling the Climate Crisis at Home and Abroad” and President Biden’s April 22, 2021 announcement establishing a new target calling for a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030, including information about the impact these initiatives will have on OVEC’s revenues and operating costs, including per MWh cost;
- Any analysis that was performed in 2021 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; or
- Any analysis conducted after 2020 of changing to seasonal operation for either of the coal plants.

IV. Conclusion

Scheduling a single deposition to gather information for multiple, unconsolidated proceedings is not permitted by the Commission’s rules, and would make it unnecessarily difficult to ensure the exclusion of irrelevant information from the evidentiary record in each of these separate audit proceedings – particularly if the deposition transcripts end up being used in the underlying evidentiary hearings (which OCC is fond of attempting). Moreover, OVEC’s subpoena *duces tecum* includes numerous topics that are clearly irrelevant to the specific electric distribution utilities and audit periods at issue in those proceedings. The prudence of OVEC-related costs during each audit period may not be measured using information obtained, policies developed, or rulemakings proposed after the audit periods expired.

For the reasons provided above, AEP Ohio, Duke Energy Ohio, and AES Ohio respectfully request that the Commission quash OCC's subpoena. OCC cannot unilaterally consolidate depositions of OVEC's representative(s) in audit proceedings that cover multiple electric distribution utilities, audit periods, and cost recovery mechanisms, and cannot depose OVEC's representative(s) on documents or topics that are irrelevant to the electric distribution utilities and audit periods at issue in each proceeding.

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion to Quash Subpoena* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 1st day of December, 2021, via electronic transmission.

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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 Protective Order (OVEC Subpoena) electronically filed
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