

**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
)	

**MEMORANDUM CONTRA MOTION OF AEP OHIO,
DUKE ENERGY OHIO AND THE DAYTON POWER AND LIGHT COMPANY
TO QUASH OCC’S SUBPOENA TO OVEC
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**BEFORE
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In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1004-EL-RDR
Company for 2018.)	

In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1759-EL-RDR
Company for 2019.)	

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

In the Matter of the Review of the)	
Reconciliation Rider of Duke Energy Ohio,)	Case No. 20-167-EL-RDR
Inc.)	

In the Matter of the OVEC Generation)	
Purchase Rider Audits Required by R.C.)	Case No. 21-477-EL-RDR
4928.148 for Duke Energy Ohio, Inc. the)	
Dayton Power and Light Company, and AEP)	
Ohio.)	

**MEMORANDUM CONTRA MOTION OF AEP OHIO,
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I. INTRODUCTION

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.¹ AEP, Duke and DP&L –recipients of corporate welfare that supports the outmoded

¹ 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 (Nov. 9, 2021).

and polluting OVEC coal plants – want the PUCO to prevent Ohio’s consumer advocate from inquiring into those subsidies. On November 19, 2021, DP&L filed in Case No. 20-165-EL-UNC to quash OCC’s subpoena to depose OVEC.² On December 1, 2021, AEP, Duke and DP&L (collectively “the Utilities”) filed to quash the subpoena.³

But the Utilities’ bargain for their privilege of serving consumers as electric monopolies is the state’s regulation of their 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.”⁴ OCC is exercising its lawful right under R.C. 4903.082 to conduct discovery. The Ohio Supreme Court recently upheld OCC’s discovery rights in reversing the PUCO’s violation of that right in the FirstEnergy Advisors case.⁵

As background, the PUCO required the Utilities’ customers (at the Utilities’ request) to subsidize electricity from two outdated, uneconomic coal power plants that are polluting the planet, as operated by OVEC during the audit period. The Utilities then apparently used their influence to convince the legislature to codify the subsidy in scandal-ridden H.B. 6. PUCO audits of the OVEC charges (that are paid by the Utilities’ consumers) confirmed that “the OVEC plants cost more than they earn.”⁶ It’s a bad deal for consumers paying the subsidies.

² *In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Case No. 20-165-EL-RDR, Motion and Memorandum in Support to Quash Subpoena Without Prejudice and Memorandum Contra to OCC Motion for Subpoena Duces Tecum (Nov. 19, 2021).

³ Motion to Quash OVEC Subpoena and Memorandum in Support (Dec. 1, 2021).

⁴ *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).

⁵ *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.

⁶ *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).

As we have found through the years, Utilities can display a sense of entitlement to their corporate welfare. Instead of an open-book approach to its utility costs and charges, the Utilities seek to quash OCC's subpoena and avoid public scrutiny. That is the Utilities' approach despite their status as regulated monopoly utilities that charge for millions of dollars in corporate welfare, and despite the ample discovery rights guaranteed under Ohio law, PUCO rules and PUCO precedent.⁷

The use of discovery especially is important in this case. That's because the PUCO issued a request for proposal seeking an auditor to perform an "independent audit" to determine whether "the Company's actions were in the best interest of retail ratepayers."⁸ Incredibly, the PUCO Staff asked the auditor to delete from her draft audit report two sentences stating that the OVEC plants "were not in the best interest of retail ratepayers."⁹

*Further, it could be expected that AEP, Duke and AES would have complained about duplication of effort had OCC not sought a consolidated deposition. OCC's approach would save resources for OVEC, the PUCO Staff, OCC and others. However, the utilities can be tough to satisfy. So, in the spirit of cooperation and to solve the Utilities' big issue, **OCC will take separate depositions in each utility's case if that is the PUCO's preference.*** Unless the PUCO rules otherwise, OCC will file separate notices of deposition in the cases, beginning first with the AEP/consumer cases (Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR). Only the AEP-

⁷ 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.").

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 & 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).

⁹ *Id.*, Initial Comments of OCC at 2-6 (Nov. 12, 2021).

related deposition of OVEC will be scheduled for December 22, 2021. OCC will establish the depositions sequence and timing for the OVEC depositions in the other cases (20-165-EL-RDR and 20-167-EL-RDR) with updated subpoenas and deposition notices at a later date.

The Utilities' motion to quash OCC's subpoena and the consumer protection it represents should be denied.

II. LAW AND ARGUMENT

A. To protect consumers, the PUCO should deny the Utilities' motion to quash because the Utilities 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."¹⁰ The Utilities cannot demonstrate that the subpoena is unreasonable or oppressive because the deposition does not require the Utilities to do anything. OCC's subpoena asks OVEC, not the Utilities, to appear at deposition and produce documents. OVEC did not file a motion to quash. The PUCO should dismiss the Utilities' motion to quash because the Utilities cannot demonstrate that the subpoena is unreasonable or oppressive.

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. 4903.082.¹¹ The Utilities want 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. 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

¹⁰ O.A.C. 4901-1-25(C).

¹¹ O.A.C. 4901-1-16(A).

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 the 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.¹² This type of complex issue is appropriately explored in a deposition, where a witness can be asked to explain the details involved.

Depositions are considered an important tool for 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.. 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 the Utilities want 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. The Utilities' motion to quash should therefore be denied.

¹² "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).

C. A party may notice a single deposition to be held in multiple proceedings if the discovery sought is relevant to each case. But OCC is resolving the Utilities' supposed big issue by changing to separate depositions per each Utility (and its consumers).

The Utilities argue that OCC acted improperly by noticing the single OVEC deposition in multiple proceedings.¹³ The Utilities claim that O.A.C. 4901-1-02(A)(6) prevents a single deposition in multiple cases. The rule simply states: "A party seeking to consolidate a new case with one or more previously filed cases shall file a motion to consolidate the cases." But OCC did not seek to consolidate cases; it merely sought a single deposition to be taken in the three utilities' cases for administrative efficiency. The Utilities' argument is without merit, but the Utilities should appreciate that OCC has resolved their issue.

*Further, it could be expected that AEP, Duke and AES would have complained about duplication of effort had OCC not sought a consolidated deposition. OCC's approach would save resources for OVEC, the PUCO Staff, OCC and others. However, the utilities can be tough to satisfy. So, in the spirit of cooperation and to solve the Utilities' big issue, **OCC will take separate depositions in each utility's case if that is the PUCO's preference.*** Unless the PUCO rules otherwise, OCC will file separate notices of deposition in the cases, beginning first with the AEP/consumer cases (Case Nos. 18-1004-EL-RDR and 18-1759-EL-RDR). Only the AEP-related deposition of OVEC will be scheduled for December 22, 2021. OCC will establish the depositions sequence and timing for the OVEC depositions in the other cases (20-165-EL-RDR and 20-167-EL-RDR) with updated subpoenas and deposition notices at a later date.

¹³ Utilities' Motion to Quash at 2-4 (Dec. 1, 2021).

D. The PUCO allows discovery of matters outside the audit period in appropriate cases.

The Utilities state “the Commission has not permitted discovery relating to matters outside the audit period.”¹⁴ This statement is wrong. The PUCO’s general rule is to limit discovery to matters occurring during the audit period. The PUCO, however, has allowed discovery outside the audit period when the information is relevant to the issues at hand.¹⁵ The discovery OCC seeks in this case is relevant to issues in the present case. The PUCO should therefore overrule the Utilities’ motion to quash.

Remarkably, the Utilities cite *In re Dominion Purchased Gas Adjustment Clause*¹⁶ to support their statement that the PUCO only allows discovery of matters occurring during the audit period.¹⁷ This is remarkable because *Dominion* actually supports OCC’s position. In *Dominion*, the PUCO ruled that OCC could obtain discovery of certain transactions going back ten years even though the case only involved a prudency review of Dominion’s gas costs for the two-year period ending October 31, 2005.¹⁸

In that case, Dominion objected to OCC’s discovery request on the ground that it was outside the audit period.¹⁹ The Attorney Examiner granted OCC’s motion to compel, allowing

¹⁴ *Id.* at 5.

¹⁵ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the East Ohio Gas Company d/b/a Dominion East Ohio and Related Matter*, Case No. 05-219-GA-GCR, Entry, 2006 Ohio PUC LEXIS 841 (July 28, 2006).

¹⁶ *Id.*

¹⁷ Utilities’ Motion to Quash at 5 (Dec. 1, 2021).

¹⁸ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the East Ohio Gas Company d/b/a Dominion East Ohio and Related Matter*, Case No. 05-219-GA-GCR, Entry, 2006 Ohio PUC LEXIS 841 (July 28, 2006).

¹⁹ *Id.* at ¶ 8.

OCC to obtain discovery of transactions up to ten years before the audit period.²⁰ The Attorney Examiner reasoned that the sought-after discovery was relevant to whether the costs during the audit period (and during the prior audit periods) was just and reasonable.²¹ The Attorney Examiner also discussed several other cases where the PUCO allowed discovery of matters outside the audit period.²²

Here any discovery OCC seeks from outside the audit period is relevant to the issues in the present cases. While the present cases only involve a prudency review of costs during 2018-2020, the PUCO is concerned with costs over the entire period of 2018 until the end of the Legacy Generation Rider in 2030. The PUCO expects that the OVEC rider will be a net credit for the entire period when the rider will be in effect, as noted by Commissioner Trombold:

The PPA mechanism proposed by the Company is designed to operate as a financial hedge against such price volatility, wherein consumers pay more when market prices are low but pay less when market prices are high. Based on the forecasts submitted by the Company and evidence in the record, *it is my clear expectation, just as it is Commissioner Haque's, that the PPA rider approved today will result in a credit (i.e. benefit) to ratepayers over the next eight years.*²³

The PUCO may need information from outside the audit period to evaluate whether the OVEC rider will be a net credit over the entire term of the rider. For example, if OVEC prepared a forecast in 2021 showing that the rider will be a net charge for the entire period, the PUCO should know about this now in order to evaluate the reasonableness of the present charges. In

²⁰ *Id.* at ¶¶ 14-21.

²¹ *Id.* at ¶ 14.

²² *Id.* at ¶¶ 12-13.

²³ *Id.*, Concurring Opinion of Commissioner M. Beth Trombold at 2 (Emphasis added).

other words, the PUCO should not allow the Utilities to collect current above-market OVEC costs if the rider will be a net charge for the entire term.

In addition, discovery may help shed light on new information that the Utilities presented flawed projections about the OVEC plants' future performance. For example, the auditor identified a serious flaw in AEP's original OVEC projections that projected a net credit over the life of the charge – AEP's projection was based on a levelized cost of entry of \$96.53/MWh.²⁴ The auditor noted that the true levelized cost of entry was only \$50.00/MWh, indicating that the OVEC plants “are not viable” in a competitive context (i.e., will not result in a net credit for consumers).²⁵

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.²⁶ Accordingly, the PUCO auditor in the AEP case recommended that OVEC reconsider its must-run offer strategy that caused these losses.²⁷ As another example, the EPA has imposed new rules for Coal Combustion Residuals and Effluent Limitation Guidelines that could dramatically increase OVEC's costs. These additional costs are an added reason why the OVEC rider is likely to be a net charge during the rider's entire term. The PUCO needs this information to decide whether it is reasonable to allow the Utilities to collect current OVEC costs, if the rider will be a net charge for the entire term.

²⁴ Audit Report at 21 (Sept. 16, 2020).

²⁵ *Id.*

²⁶ *Id.* at 52.

²⁷ *Id.* at 9.

If the Utilities had any concern for consumers, they would present this information to the PUCO themselves. The Michigan Public Service Commission (“MPSC”) highlighted this point in a recent order. The case involved Indiana Michigan Power Company’s (an AEP affiliate) fuel adjustment clause. The case 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 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.*”²⁸

The Utilities should be constantly evaluating current and future projections of OVEC costs versus PJM market prices so that, if necessary, the Utilities can “renegotiate contract provisions to ensure continued value for ratepayers.” The PUCO should disallow any OVEC costs that exceed PJM market prices. As a result, this topic is a proper subject for discovery and the PUCO should overrule the Utilities’ motion to quash.

E. A party may depose a witness on matters “relevant to the subject matter of the proceeding” or “reasonably calculated to lead to the discovery of admissible evidence.”

The Utilities seek to quash the subpoena because it may lead to OVEC from testifying on matters outside the scope of each of the proceedings.²⁹ This is not a valid ground for quashing a subpoena. The PUCO should therefore overrule the Utilities’ motion to quash.

²⁸ *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) (Emphasis added).

²⁹ Utilities’ Motion to Quash at 4 (Dec. 1, 2021).

As noted earlier, the proper test for whether a deposition should be allowed is whether the deposition seeks information “relevant to the subject matter of the proceeding” or “reasonably calculated to lead to the discovery of admissible evidence.”³⁰ The information OCC seeks to obtain from OVEC goes to matters such as forecasts of OVEC costs vs. PJM market prices; planned capital investments for environmental compliance; seasonal operation of the OVEC plants and OVEC’s practice for committing the plants into the PJM Day-Ahead Energy Market. These matters all go to the reasonableness, and hence prudence, of OVEC’s costs. This is the ultimate issue in all the cases and so these are proper topics for discovery. The PUCO should therefore overrule the Utilities’ motion to quash.

III. CONCLUSION

OCC seeks to depose OVEC to obtain information that is relevant to whether OVEC’s costs are reasonable. OCC has resolved above the Utilities’ objection to taking a single deposition in multiple cases. The PUCO should deny the AEP, Duke and AES Motion to Quash the OCC subpoena.

Respectfully submitted,

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³⁰ O.A.C. 4901-1-16(B).

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served upon the persons listed below by electronic transmission this 16th day of December 2021.

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

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RDR, 21-0477-EL-RDR**

Summary: Memorandum Memorandum Contra Motion of AEP Ohio, Duke Energy Ohio and the Dayton Power and Light Company to Quash OCC's Subpoena to OVEC by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Finnigan, John