

**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
	)	

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**JOINT MEMORANDUM CONTRA AES OHIO, DUKE ENERGY OHIO, INC., AND OHIO POWER COMPANY’S MOTION TO QUASH OVEC SUBPOENA  
BY  
THE OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP  
AND  
THE KROGER CO.**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) initiated the above-referenced proceedings to review the reasonableness of the costs that AES Ohio (formerly, The Dayton Power and Light Company), Ohio Power Company (AEP), and Duke Energy Ohio, Inc. (Duke)

(collectively, Joint Movants) charged their customers to subsidize two aging coal plants that they co-own and that Ohio Valley Electric Corporation (OVEC) operates.<sup>1</sup> Despite the Commission’s appropriate review of the reasonableness of the costs that customers are being charged regarding the two aging coal plants (one of which is located in Indiana), the Joint Movants seek to thwart the Commission’s review and prevent parties from obtaining information that is relevant to customers’ OVEC-related charges and the Commission’s review of those charges.

The Ohio Manufacturers’ Association Energy Group (OMAEG) and The Kroger Co. (Kroger) have intervened and have filed extensive comments and reply comments advocating that the Commission should disallow the collection of any costs related to OVEC during the respective audit periods that were imprudent or not in the best interests of customers.<sup>2</sup> OMAEG and Kroger have also opposed previous attempts by the Joint Movants to limit parties’ discovery rights or parties’ use of the discovery in some of the above-captioned proceedings.<sup>3</sup>

On November 9, 2021, consistent with Ohio law that grants parties “ample rights to discovery” and the Commission’s rules that are intended to “aid full and reasonable discovery by

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<sup>1</sup> See Case Nos. 18-1004-EL-RDR, et al., Entry at ¶ 1 (January 15, 2020) (initiating an audit of the OVEC costs recovered through AEP’s Power Purchase Agreement Rider for the period of January 1, 2018 through December 31, 2019); Case No. 20-165-EL-RDR, Entry at ¶ 1 (January 29, 2020) (initiating an audit of the OVEC costs recovered through AES Ohio’s Reconciliation Rider for the period of November 1, 2018 through December 31, 2019); Case No. 20-167-EL-RDR, Entry at ¶ 1 (February 13, 2021) (initiating an audit of the OVEC costs recovered through Duke’s Reconciliation Rider for the period of January 1, 2019 through December 31, 2019); Case No. 21-477-EL-RDR, Entry at ¶ 1 (May 5, 2021) (initiating an audit of the OVEC costs recovered through AES Ohio, AEP, and Duke’s Legacy Generation Resource Riders for the period of January 1, 2020 through December 31, 2020).

<sup>2</sup> See OMAEG’s Motion to Intervene, Case Nos. 18-1004, et al. (January 11, 2021); See Kroger’s Motion to Intervene, Case Nos. 18-1004, et al. (January 11, 2021); OMAEG’s Motion to Intervene, Case No. 20-165-EL-RDR (January 5, 2021); Kroger’s Motion to Intervene, Case No. 20-165-EL-RDR (January 5, 2021); See OMAEG’s Motion to Intervene, Case No. 20-167-EL-RDR (December 18, 2020); Kroger’s Motion to Intervene, Case No. 20-167-EL-RDR (December 18, 2020); See, e.g., OMAEG and Kroger’s Joint Comments, Case Nos. 18-1004, et al. (November 12, 2021); OMAEG and Kroger’s Joint Reply Comments, Case Nos. 18-1004, et al. (December 3, 2021).

<sup>3</sup> See, e.g., OMAEG and Kroger’s Joint Memorandum Contra AES Ohio’s Motion to Quash, Case No. 20-165-EL-RDR (December 6, 2021).

all parties,”<sup>4</sup> the Office of the Ohio Consumers’ Counsel (OCC) filed a motion to subpoena OVEC to appear at a deposition (Subpoena) in all of the above-captioned proceedings.<sup>5</sup> On November 19, 2021, AES Ohio individually filed a motion to quash the Subpoena in its OVEC case,<sup>6</sup> and now seeks a second bite at the apple by filing a second joint motion to quash with the other two utilities on December 1, 2021(Motion to Quash).<sup>7</sup> As a threshold issue, it is unclear why AES Ohio believes it is entitled to a second bite at the apple to challenge the Subpoena. Any of AES Ohio’s arguments against the Subpoena should have already been sufficiently addressed in AES Ohio’s November 19, 2021 motion to quash because filing duplicitous motions is a waste of the Commission and parties’ time and resources. Accordingly, AES Ohio’ second motion to quash is improper and should be rejected as a duplicate pleading, not allowed by the Commission’s rules.

Notwithstanding the improper nature of the Joint Movants’ Motion to Quash (at least with regard to AES Ohio), the Motion to Quash fails to satisfy the requisite legal standard and should be denied. In order for the Joint Movants’ Motion to Quash to be granted, they must demonstrate that OCC’s Subpoena is “unreasonable and oppressive.”<sup>8</sup> The Joint Movants cannot meet this burden for two simple reasons.

First, the Joint Movants do not have standing to contest OCC’s Subpoena to non-party OVEC because the Joint Movants themselves will not face any burden, let alone an unreasonable or oppressive burden from parties deposing an OVEC representative.

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<sup>4</sup> R.C. 4903.082.

<sup>5</sup> OCC’s Subpoena Case Nos. 18-1004-EL-RDR, et al., Case No. 20-165-EL-RDR, Case No. 20-167-EL-RDR, Case No. 21-477-EL-RDR (November 9, 2021).

<sup>6</sup> See AES Ohio’s Motion to Quash, Case No. 20-165-EL-RDR (November 19, 2021).

<sup>7</sup> Motion to Quash, Case Nos. 18-1004-EL-RDR, et al., Case No. 20-165-EL-RDR, Case No. 20-167-EL-RDR, Case No. 21-477-EL-RDR (December 1, 2021).

<sup>8</sup> See Ohio Adm. Code 4901-1-25(C).

Second, under the Commission’s rules, “any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding” and “[i]t is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>9</sup> Here, parties seek to depose an OVEC representative about topics related to OVEC operations and the costs associated with OVEC that are being assessed to customers through various utility riders, which are the subject of the Commission’s prudence and performance reviews and the audit reports filed in the above-captioned proceedings. Thus, Joint Movants are unlawfully attempting to prevent parties’ reasonable and ordinary use of discovery in a Commission proceeding.

Additionally, the Joint Movants have argued that if *any* deposition of an OVEC representative should occur, parties must be required to conduct multiple depositions of the same OVEC representative, rather than one.<sup>10</sup> This recommendation has no basis in Ohio law or the Commission’s rules and if adopted would place an unnecessary burden on parties who seek to reasonably exercise their discovery rights.

For the foregoing reasons and as explained in further detail below, OMAEG and Kroger hereby file their Joint Memorandum Contra and respectfully request that the Commission deny the Joint Movants’ Motion to Quash the valid Subpoena. Allowing the deposition to go forward will contribute to a just and expeditious resolution of the issues in these proceedings.

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<sup>9</sup> See Ohio Adm. Code 4901-1-16(B).

<sup>10</sup> Motion to Quash at 4.

## II. LAW AND ARGUMENT

### A. The Commission Should Deny The Motion Because The Joint Movants Lack Standing Under Ohio Law to Challenge a Subpoena of Non-Party OVEC.

The Joint Movants lack standing to bring their Motion to Quash. Ohio courts have held that “[i]n order to have standing, a party must have an actual or imminent injury, there must be a causal connection between the injury and the conduct the party is addressing, and the court must be capable of redressing the injury with its decision.”<sup>11</sup>

Tellingly, the Motion to Quash makes no mention of any purported injury that the Joint Movants *themselves* would suffer should non-party OVEC be required to attend a deposition. This is of course because the Joint Movants are incapable of demonstrating any such injury.

Ohio courts have also held that only the person subpoenaed has standing to file a motion to quash the subpoena.<sup>12</sup> For example, in *Abels v. Ruf*, a patient sued a doctor, a hospital, and a management company for negligence and issued three subpoenas to three non-parties.<sup>13</sup> The non-parties were commanded to appear at a deposition and produce various documents related to their prior work with the defendant doctor.<sup>14</sup> The Ninth District Court of Appeals affirmed the lower court decision denying both the doctor’s and management company’s motions to quash the subpoenas because neither defendant was issued the subpoena and therefore lacked standing to challenge the subpoena.<sup>15</sup> While, OVEC, the entity who was issued the Subpoena in the above-

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<sup>11</sup> *Hoerig v. Tiffin Scenic Studios, Inc.*, 2011-Ohio-6103, ¶ 21 (citing *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351).

<sup>12</sup> *See, e.g., Jones v. Recs. Deposition Serv. of Ohio, Inc.*, 2002-Ohio-2269, ¶ 13; *Ramus v. Ramus*, No. 34965, 1976 WL 191006, at \*4 (Ohio Ct. App. Aug. 19, 1976); *Abels v. Ruf*, 2006-Ohio-3813, ¶ 9, 2006 WL 2060552 at \*2 (July 25, 2006).

<sup>13</sup> *Abels v. Ruf*, 2006-Ohio-3813 at \*1.

<sup>14</sup> *Id.* at \*2.

<sup>15</sup> *Id.*

referenced proceeding, has contested OCC's Subpoena, the Joint Movants cannot lawfully do so on OVEC's behalf.<sup>16</sup>

Accordingly, the Joint Movants lack standing under Ohio law to bring their Motion to Quash and the Commission should deny the Motion outright for that reason alone.

**B. The Commission Should Deny The Motion to Quash Because the Deposition Noticed is a Reasonable and Ordinary Use of Parties' Discovery Rights.**

Even if the Joint Movants had standing to challenge OCC's Subpoena (which they do not), the Joint Movants still cannot demonstrate that the Subpoena is unreasonable and oppressive. As discussed above, R.C. 4903.082 provides that "all parties and intervenors shall be granted ample rights of discovery" in Commission proceedings and that the "rules of the public utilities commission should...aid full and reasonable discovery by all parties." Moreover, under Ohio Adm. Code 4906-1-16(B), "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding" and "[i]t is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Such 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."<sup>17</sup>

The Joint Movants have argued that all of the above-captioned proceedings are distinct because they do not involve the same utilities and audit periods and therefore certain topics would be "completely irrelevant" to the other proceedings.<sup>18</sup>

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<sup>16</sup> See OVEC's Motion to Quash, Case Nos. 18-1004-EL-RDR, et al., Case No. 20-165-EL-RDR, Case No. 20-167-EL-RDR, Case No. 21-477-EL-RDR (December 13, 2021).

<sup>17</sup> Ohio Adm. Code 4901-1-16(B) (emphasis added).

<sup>18</sup> Joint Motion to Quash at 3 (December 1, 2021).

Ohio R. Evid. 401 defines “relevant evidence” as “evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (Emphasis added). Ohio courts have recognized that this standard “produce[s] a low threshold of admissibility, which ‘reflect[s] the policy favoring the admission of relevant evidence for the trier of fact to weight.’” *State v. West*, 2017-Ohio-4055, ¶ 77, 91 N.E.3d 365, 379 (*State v. Kehoe*, 133 Ohio App.3d 591, 606, 729 N.E.2d 431 (12th Dist. 1999)).

It is indisputable that each of the five proceedings pertain to AES Ohio, AEP, and Duke’s recovery of the same costs related to the same two aging coal plants operated by OVEC and assessed to customers and collected through Commission-approved rider mechanisms.<sup>19</sup> And that AES Ohio, AEP, and Duke all have ownership interests in the same OVEC plants pursuant to the Intercompany Power Agreement (ICPA).<sup>20</sup> There is clearly a substantial overlap of the factual circumstances at issue in all of the cases and an OVEC representative is the best individual to speak to these facts. As discussed above, the Joint Movants also incorrectly speculated that information from outside of an audit period has absolutely no relevance to the Commission’s review. Information from outside of an audit period can be relevant for many purposes, including the following: demonstrating that a pattern exists; demonstrating the economic effects of decisions made during the audit period or prior to the audit period that have an effect on costs assessed and

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<sup>19</sup> See Case Nos. 18-1004-EL-RDR, et al., Entry at ¶ 1 (January 15, 2020) (initiating an audit of the OVEC costs recovered through AEP’s Power Purchase Agreement Rider for the period of January 1, 2018 through December 31, 2019); Case No. 20-165-EL-RDR, Entry at ¶ 1 (January 29, 2020) (initiating an audit of the OVEC costs recovered through AES Ohio’s Reconciliation Rider for the period of November 1, 2018 through December 31, 2019); Case No. 20-167-EL-RDR, Entry at ¶ 1 (February 13, 2021 ) (initiating an audit of the OVEC costs recovered through Duke’s Reconciliation Rider for the period of January 1, 2019 through December 31, 2019); Case No. 21-477-EL-RDR, Entry at ¶ 1 (May 5, 2021) (initiating an audit of the OVEC costs recovered through AES Ohio, AEP, and Duke Legacy Generation Resource Riders for the period of January 1, 2020 through December 31, 2020).

<sup>20</sup> ICPA, <https://www.sec.gov/Archives/edgar/data/73986/000000490406000041/x10a2.htm>.

collected from customers during the audit period; or demonstrating that certain information was available to an individual at a specific time. Therefore, the Joint Movants' argument that the Subpoena seeks irrelevant information is overly simplified, not based in Ohio law, and ignores the substantial overlap of the above-captioned cases.

Joint Movants further argued that the transcript of the deposition “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.”<sup>21</sup> Again, this argument is highly speculative and not based on existing fact or law. All of the parties are represented by competent counsel and the Commission’s rules are “intended to minimize commission intervention in the discovery process.”<sup>22</sup> To the extent objections are raised at the deposition parties can come to a reasonable resolution among themselves or are capable of seeking intervention from an Attorney Examiner should the need arise.

Consequently, the Commission should deny Joint Movants’ Motion because, consistent with the Commission’s rules, the information sought by the Subpoena appears reasonably calculated to lead to the discovery of admissible evidence.<sup>23</sup>

**C. The Commission Should Reject the Joint Movants’ Argument That Parties Are Required to Conduct Five Depositions of the Same OVEC Representative.**

The Commission’s rules encourage “the prompt and expeditious use of discovery.”<sup>24</sup> Clearly, Joint Movants’ argument that the parties must conduct five separate depositions of the same OVEC representative in the above-captioned proceedings is at odds with this objective. As

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<sup>21</sup> *Id.*

<sup>22</sup> *See* Ohio Adm. Code 4901-1-16(A).

<sup>23</sup> *See* Ohio Adm. Code 4906-2-14(B).

<sup>24</sup> *See* Ohio Adm. Code 4901-1-16.

discussed above, there is a substantial overlap among the cases because all of the cases concern the reasonableness of costs related to the same two aging coal plants that are recovered through Commission-approved recovery mechanisms and AES Ohio, AEP, and Duke all have ownership interests in the OVEC coal plants (including the plant in Indiana). Requiring the parties to conduct five separate depositions of the same OVEC representative would be unreasonable and unduly burdensome, not to mention, an immense waste of the parties' time and resources and potentially that of the Commission to the extent an Attorney Examiner's intervention is required. Therefore, the Commission should reject this argument and allow parties to conduct discovery in accordance with the Commission's rules.

### **III. CONCLUSION**

For the foregoing reasons, OMAEG and Kroger respectfully request that the Commission deny the Motion to Quash the Subpoena and allow the deposition noticed to OVEC for an OVEC representative to appear, which is currently scheduled for December 22, 2021, to occur.

Respectfully submitted,

/s/ Thomas V. Donadio

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## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on December 16, 2021 upon the parties listed below.

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**Case Nos. 18-1004-EL-RDR, et al.**

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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**

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