

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)
Reconciliation Rider of The Dayton)
Power and Light Company)

Case No. 20-165-EL-RDR

**REPLY MEMORANDUM IN SUPPORT OF MOTION OF
THE DAYTON POWER AND LIGHT COMPANY
TO QUASH SUBPOENA WITHOUT PREJUDICE,**

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 replies to the memorandum contra filed by the Ohio Office of the Consumers’ Counsel (“OCC”) on December 1, 2021 (“OCC Memorandum Contra”), which Memorandum Contra attempts to bolster support for a subpoena seeking a deposition of a witness from the Ohio Valley Electric Corporation (“OVEC”) and the production of documents. As set forth herein and in AES Ohio’s November 19, 2021, memorandum to quash without prejudice, OCC continues to seek information that is out of the scope of this proceeding or that is already in its possession.

Key Procedural Information.

The proceeding involves a partial year of 2018 and all of 2019. A full audit by an outside auditor selected by the Ohio Public Utilities Commission of Ohio (“PUCO” or “Commission”) has been performed and a report has been issued. That report represents the auditor’s analysis and conclusions after reviewing literally hundreds of documents and written responses to dozens of follow-up interrogatories that were provided by AES Ohio to the PUCO auditor. Every single one of those documents and responses has been provided to OCC. The audit report is now before the Commission awaiting approval. The proceeding has not been set for evidentiary hearings.

The OCC subpoena should be quashed, without prejudice. OCC should be allowed to seek a subpoena in the event evidentiary proceedings are scheduled by the PUCO. Even then, OCC should be limited to requesting information that pertains to the audit years (November 2018 – December 2019). OCC’s current subpoena seeks information outside the audit period.

AES Ohio Reply

I. **Generalized Assertions Regarding Discovery Fail to Justify the Excessive Scope and Irrelevance of OCC’s Requested Subpoena.**

OCC’s memorandum contra fails to address the specific issues raised by AES Ohio’s Memoranda in Support of its Motion to Quash with respect to this particular subpoena. OCC instead relies on generalized assertions regarding the permissible scope of discovery.

AES Ohio’s initial Memorandum at pp. 5-8 listed each of the sets of documents that OCC was demanding and showed, one-by-one, the requests that were for documents that were entirely out-of-scope because they were for years outside the audit period, and the requests that had both out-of-scope and in-scope periods, but with respect to the in-scope information, was seeking documents that had already been provided to the PUCO auditor and then turned over to OCC. The OCC studiously avoids even mentioning this list. At no point within OCC’s Memorandum Contra is there even any recognition that there is a specific audit period at issue in this proceeding or that there is no basis for seeking information that is for later years.

OCC instead relies on generalized and often wrong assertions regarding this case and discovery rights.

OCC incorrectly conflates objections to this particular subpoena as opposition to all discovery. AES Ohio is accused of displaying a sense of entitlement, not applying an “open book approach to its utility costs and charges” and seeking to “avoid state scrutiny.” OCC Memorandum Contra at 2. None of these accusations has any basis in fact. AES Ohio

recognizes and fulfills its obligations as a utility and a good corporate citizen of Ohio without a sense of entitlement. Our books are completely open to scrutiny – every OVEC-related cost and OVEC-related revenue has been meticulously recorded and presented first to the auditor hired by the PUCO and then to OCC. This warrants repetition: OCC already has all the documents and data relevant to the costs and charges incurred for the period November 2018 – December 2019 that were recorded into the Reconciliation Rider.

OCC claims that it needs additional discovery to further explore how OVEC bids into PJM's daily energy markets on a "must-run" basis that was raised in audits involving AEP and Duke Energy Ohio but, as alleged by OCC, was not addressed by the auditor in the AES Ohio audit. OCC Memorandum Contra at 3. But OCC either overlooked or fails to recognize that the auditor in this proceeding did look at this issue and explicitly stated that: "For PJM-member Sponsoring Companies, OVEC normally bids their generation share of each plant as "must-run" in PJM's Day-Ahead market." Independent Audit of the Reconciliation Rider of Dayton Power and Light Company Final Report 9/20/2020 ("Audit Report") p. 9. In other words, OVEC bids in these plants for Duke, AEP and AES Ohio the same way. The auditor then thoroughly reviewed both AES Ohio's role and OVEC's processes for bidding into PJM and concluded that: "OVEC's operating procedures reflect a diligent approach to operational decision-making and market scheduling" and "The auditors find that the operational processes and procedures undertaken by OVEC on behalf of the Sponsoring Companies to be prudent." Audit Report p. 10. In short, the Audit Report did address this issue. Moreover, there is no additional information that OCC could seek to obtain with respect to this issue that they do not already have through their participation in the Duke and AEP audit proceedings.

OCC asserts that AES Ohio cannot demonstrate that the OCC Subpoena is unreasonable or oppressive. OCC Memorandum Contra at 4-5. But as set forth in its table at pp. 5-8 of its initial Memorandum, AES Ohio has demonstrated that the OCC Subpoena is vastly overbroad in seeking information for years after the end of the audit period and in seeking information that OCC already has. It is inherently unreasonable and oppressive to seek information not relevant to the audit period and information already in OCC's hands.

OCC also takes the view that it has the right to take depositions and that "This is OCC's choice to make." OCC Memorandum Contra at 5. That is an incorrect statement of law. It is the Commission that has the right to determine when and if certain forms of discovery are permissible. 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).

OCC also argues that depositions are an important tool in an attorney's case preparation. Memo contra at 6. That is not in dispute as a general principle. The particular issue presented here though is whether a deposition is a tool that should be employed to seek information that is either outside the audit period or largely already in OCC's possession, and additionally, whether it is reasonable to do so in a proceeding where there are no evidentiary hearings scheduled. AES Ohio respectfully submits that in these particular circumstances, depositions and additional document demands should not be authorized.

OCC incorrectly summarizes an AES Ohio argument regarding the documents already provided to OCC. OCC asserts that "AES Ohio argues that OCC should not be permitted to take a deposition . . . because DP&L has already produced documents to OCC." OCC Memorandum

Contra at 6. That misses the mark. AES Ohio argues that OCC should not be permitted to take a deposition at this time because the case has not been set for evidentiary hearings. And AES Ohio argues that OCC should not be permitted to take a deposition to explore issues and costs that are outside the audit period. And AES Ohio argues that OCC should not be permitted to subpoena documents from OVEC that are already in OCC's hands.

AES Ohio is offended by and wishes to call to the PUCO's specific attention OCC's argument and allegation that AES Ohio is attempting to "whipsaw" OCC by first objecting to written discovery that might be better addressed through depositions and now objecting to depositions. OCC Memorandum Contra at 7-8. This is false and intended, intentionally, to mislead.

OCC is well aware of these three facts. First, the objection to which OCC refers is boiler-plate language that appeared at the head of a set of standardized objections and only states the grounds for a possible objection. Second, AES Ohio not once in this proceeding ever cited back to this boiler-plate possible objection as a basis for failing to respond to written discovery. In fact, AES Ohio has responded to each and every document request and interrogatory that OCC has presented. There has been no whip-saw. Third, and the reason why this OCC argument deserves condemnation: OCC made exactly the same argument earlier in this proceeding in a discovery related memorandum contra it filed on April 1, 2021, quoting the same boiler-plate objection and making the same allegation of "whipsaw."¹ AES Ohio pointed out then as well that there was no whipsaw because it had never relied on that objection and had responded fully to all written discovery requests.

¹ *In the Matter of In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company*, Case No. 20-265-EL-RDR, OCC Memorandum Contra at 8 (Apr. 1, 2021).

OCC's misleading arguments about a whipsaw might have been an innocent error made once. When repeated in the same case, however, and with the same lack of any basis, it is clearly intentionally misleading and offensive.

OCC concludes its Memorandum Contra with a unfounded claim that contains within it an admission against interest. OCC claims that "intervenors are typically afforded full discovery rights, even in proceedings without scheduled hearings." OCC Memorandum Contra at 9. AES Ohio would dispute how "typical" this is, but it is indisputable that implicit within OCC's statement is the concession that full discovery rights are not automatic, but are instead within the Commission's discretionary authority. The Commission was clear on this point in rejecting a previous OCC attempt to define discovery rights as attaching to every type of Commission proceeding, stating:

If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner that it deems appropriate and would unduly delay the outcome of many cases. The request is denied.

In re Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Case No. 06-685-AU-ORD, Finding and Order at ¶ 9 (Dec. 6, 2006).²

In summation, OCC continues to seek discovery rights to pursue documents that are for time periods outside the audit period and, with respect to the portion of its demands that are within the audit period, is seeking information that is all or virtually all within its hands already.

The Commission and its Attorney Examiner established this proceeding for a limited historical

² See also *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (Oct. 28, 2003) ("The Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required.").

period in a case under a procedural schedule that has now been completed – a full independent audit has been performed, a report has been issued and comments on the report have been filed by all interested parties. Any additional process sought by OCC at this point would unduly delay the outcome of this case, which should be the adoption by the Commission of the audit report.

II. AES Ohio Notes An Objection to Intemperate Language Employed by OCC.

AES Ohio respectfully requests that within the PUCO's order addressing this discovery dispute, the PUCO also gently remind all parties that civility is expected in pleadings.

Name-calling such as OCC's labeling AES Ohio as the "ungrateful recipient of corporate welfare" should be discouraged. Nor is it helpful to the decision-making process for OCC to claim that AES Ohio "feed[s] at the public trough," which is, in any event, an odd criticism coming from a public agency. Dark insinuations about what the General Assembly authorized and why are purely emotional arm-waving that has no bearing on the discovery dispute that is presented here. OCC knows that there has been no allegation of wrong-doing on the part of any of the utilities that have OVEC costs in their rates. OCC Memorandum Contra at 1-2.

And while directed not at a company, but a power plant, it is not relevant to the discovery dispute and factually inaccurate to claim (OCC Memorandum Contra at 2) that the OVEC plants are "polluting the planet" when they, in fact, meet all environmental requirements. These are assertions designed to sway emotions, not provide legal guidance on a technical matter of discovery.

III. Out-of-Period "Evidence" from Another State Has No Relevance Here.

As further support for seeking a deposition in this proceeding, OCC has cited to a Michigan proceeding where forecasts were made of OVEC costs and revenues for a Michigan

company that owns a share of OVEC. OCC Memorandum Contra at 3-4.³ But OCC has failed to inform the PUCO that this Michigan case involved projected costs and revenues for 2021-2025 and included some actual data from 2020. The case before this Commission involves the historic period November 2018 through December 2019. There is not even any overlap here. The Michigan case and the data reviewed there are not relevant to any of the costs recorded in the Reconciliation Rider for the audit period here.

IV. Conclusion.

AES Ohio's reply memorandum would look far different if the OCC had actually responded to AES Ohio's initial memorandum. If OCC had pared back its Subpoena Duces Tecum requests to only those documents that it did not have already and that were within the audit year, AES Ohio would have gladly supplemented the existing small mountain of data and documents that is already in OCC's possession.

But, instead, OCC has continued to seek a deposition and documents to address issues outside the audit period and is apparently even seeking to explore new areas suggested by a Michigan case that was examining data outside the audit period here.

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.⁴ That has occurred. An Entry by the Attorney Examiner has permitted comments to be filed, which has

³ Citing to *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).

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.

also occurred.⁵ 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.

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, November 2018 through December 2019, is not already in its possession.

Respectfully submitted,

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December 6, 2021

⁵ *Id.*, Entry at ¶ 16, Nov. 30, 2020.

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was served via electronic transmission upon the following parties of record this 6th day of December 2021.

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Summary: Reply Reply Memorandum of The Dayton Power and Light Company to the Memorandum Contra of OMAEG and Kroger electronically filed by Mr. Randall V. Griffin on behalf of The Dayton Power and Light Company