

**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

**REPLY IN SUPPORT OF
MOTIONS OF OHIO POWER COMPANY,
DUKE ENERGY OHIO, INC.,
THE DAYTON POWER AND LIGHT COMPANY, AND
OHIO VALLEY ELECTRIC CORPORATION
TO QUASH SUBPOENA**

On November 9, 2021, the Office of the Ohio Consumers' Counsel ("OCC") filed a Subpoena Duces Tecum to be served on Ohio Valley Electric Corporation ("OVEC"), which was notable in two ways. First, it proposed to consolidate five different proceedings for purposes of deposition, despite the lack of any procedural rule authorizing such a maneuver or Commission

approval. Second, it directed OVEC to produce over a dozen categories of documents and testimony that related (in whole or in part) to times outside the specified audit periods.

On December 1, 2021, 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”) (“the EDUs”) moved jointly to quash OCC’s Subpoena Duces Tecum.¹ OVEC joined the motion on December 13, 2021. The joint motion explained that a consolidated deposition would raise unnecessary procedural complications and expressed that OCC should have scheduled separate depositions for each of the proceedings. It further noted that Commission audits generally do not review matters outside the audit period, and asked that OVEC not be required to produce documents or information relating to periods outside (primarily, *after*) the audit periods and otherwise not within the scope of appropriate discovery.”

Even though OCC wishes to quickly take the deposition in advance of the testimony deadline, it took the full time allowed by Rule 4901-1-12 to respond to the Motion to Quash. The EDUs and OVEC are filing this reply five days ahead of schedule in an attempt to give the Commission the opportunity to rule on the motion prior to the scheduled deposition on December 22, 2021 (since the witness will not be presented on that date absent a ruling on this motion).²

The Memoranda Contra filed by OCC and, jointly, the Ohio Manufacturers’ Association Energy Group (OMAEG) and the Kroger Co. (“Kroger”), raise three arguments, the first two of which are now moot. OCC and OMAEG/Kroger first argue that it was permissible for OCC to

¹ AES Ohio also filed a separate Motion to Quash in Case No. 20-165-EL-RDR on November 19, 2021.

² Ohio R. Civ. P. 30(D) anticipates the suspension of depositions when there are fundamental disputes like those raised in the Motion to Quash in order to permit the Court to resolve them. “Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.”

consolidate five different proceedings unilaterally for the purpose of deposition. This argument is moot because OCC has agreed to “take separate depositions in each utility’s case.” (OCC Memo Contra at 6.)³

Second, OCC and OMAEG/Kroger argue that the EDUs lacked standing to challenge OCC’s Subpoena Duces Tecum “on OVEC’s behalf.” (OMAEG/Kroger Memo Contra at 5; *see also* OCC Memo Contra at 4.) That position is incorrect. Rule 4901-1-25(C) allows “any party” affected by a subpoena to move to quash it (*see Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA et al., Entry, ¶ 9 (Jan. 2, 2007) (permitting non-parties to move to quash subpoenas. “[T]he examiner finds that the wording in the rule is, in this circumstance, more appropriately interpreted as meaning that the examiner may quash a subpoena upon the motion of an affected person”), and the Commission has entertained motions to quash subpoenas filed by parties, as opposed to the subpoenaed third-parties. *See, e.g., In re Complaint of Brenda and Gerard Fitzgerald v. Duke Energy Ohio, Inc.*, Case No. 10-791-EL-CSS, Entry (Apr. 25, 2011) (granting in part Duke Energy Ohio’s motion to quash a subpoena filed by complainants requesting various individuals, including a Commission employee, Duke Energy’s CEO, customer service representatives working for a Duke affiliate, and former employees of a Duke contractor, to appear at hearing).

Regardless, OMAEG and Kroger acknowledge that OVEC subsequently joined the EDUs’ joint

³ OCC then proceeded to file a Notice of Deposition in the AEP Ohio PPA Rider Cases for the OVEC deposition – forgetting, apparently, that deposing a third-party requires a motion for subpoena. This is simply the most recent time that OCC has disregarded the requirements of the Commission’s procedural rules in these proceedings. *See, e.g., AEP Ohio PPA Rider Cases*, Motion of Ohio Power Co. for Protective Order (Jan. 11, 2021) (asserting that OCC’s deposition notice failed to provide reasonable notice or 20 days to respond to OCC’s document requests); *Duke Energy Ohio Reconciliation Rider Case*, Duke Energy Ohio Memo Contra OCC Motion for Subpoena Duces Tecum (Nov. 3, 2021) (challenging, *inter alia*, OCC’s attempt to subpoena Staff witnesses to testify in the Duke Energy Ohio hearing about communications regarding the audit report in the *AEP Ohio* cases). So the subpoena remains subject to being quashed, and the notice of deposition for a non-party is ineffective.

motion,⁴ and all parties appear to concede OVEC's standing to contest the Subpoena Duces Tecum that OCC served it. (*Id.* at 5-6 and n.16.)

This leaves only the third issue: whether OCC may use the discovery process to gather information and documents that go beyond the temporal and topical scope of these proceedings. As noted above, OCC's subpoena to OVEC lists over a dozen topics on which OCC is requesting testimony and documents, all of which relate (in whole or in part) to periods of time outside of (specifically, after) the audit periods and is otherwise outside the scope of discovery. (EDUs' Motion to Quash at 5-9.) Ample Commission precedent holds that audit proceedings generally focus on matters occurring during the audit period and that discovery relating to matters outside the audit period is generally prohibited. (*See id.* at 5.) OCC even concedes that "[t]he PUCO's general rule is to limit discovery to matters occurring during the audit period." (OCC Memo Contra at 7).

OCC, OMAEG, and Kroger point to OCC's "ample rights of discovery" under R.C. 4903.082 and its right to serve subpoenas. (*See* OCC Memo Contra at 4-5; OMAEG/Kroger Memo Contra at 2, 4, 6.) OCC also repeats the accusation it has made throughout these proceedings whenever its violations of the Commission's discovery rules are challenged: that the EDUs are simply "entitle[d]" and want to "avoid public scrutiny." (OCC Memo Contra at 3.) But the EDUs and OVEC are not arguing that OCC may not depose OVEC (at least, not in the audit proceedings in which the Commission has scheduled hearings). (*See AES Ohio Reconciliation Rider Audit Case*, AES Ohio Motion to Quash Subpoena Without Prejudice at 2-4 (Nov. 19, 2021).) They are asking that the Commission enforce the basic limit set forth in its

⁴ OCC is seemingly unaware that OVEC filed a Motion to Quash the subpoena in this matter. (*See* OCC Memo Contra at p. 4 (stating "OVEC did not file a motion to quash").)

discovery rules: that the information sought be “relevant to the subject matter of the proceeding” or “reasonably calculated to lead to the discovery of admissible evidence.” Ohio Adm.Code 4901-1-16(B). Moreover, they are asking the Commission to affirm that a subpoena that attempts to obtain discovery in an audit proceeding on irrelevant topics outside the audit period is “unreasonable or oppressive” for purposes of Ohio Adm.Code 4901-1-25(C).

On this point, OCC points to Commission precedent allowing discovery regarding the time *before* the audit period. In particular, OCC cites a 2006 Entry from a Dominion East Ohio case, in which the Commission cited prior opinions that had “allowed discovery and admission of evidence” regarding errors made in past audits and, accordingly, allowed OCC to obtain discovery regarding transactions going back ten years. (*See* OCC Memo Contra at 7-8, citing *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 and Related Matters*, Case No. 05-219-GA-GCR, Entry ¶¶ 12-21 (July 28, 2006).) OMAEG and Kroger make a similar argument, asserting that information from before the audit period “can be relevant for many purposes,” including “demonstrating the economic effects of decisions made *during* the audit period or *prior* to the audit period * * * or demonstrating that certain information was available to an individual at a specific time.” (Emphasis added.) (OMAEG/Kroger Memo Contra at 7-8.)

But OCC is not arguing that it should be permitted to seek discovery regarding documents created, or information developed, before the audit periods. OCC is arguing that it should be permitted to seek discovery regarding “the entire period of 2018 until the end of the Legacy Generation Rider [LGR] in 2030” – the period including *and after* the audit periods in the various proceedings (2018-2020). (OCC Memo Contra at 8.) Nor is OCC seeking such discovery for any of the reasons that OMAEG and Kroger suggest might be legitimate. Instead,

OCC freely admits that it is seeking information regarding expected costs under the LGR going forward because OCC believes “[t]he 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.” (*Id.* at 9.)

Deciding whether to allow the EDUs to collect *current* OVEC costs is not the purpose of any of these proceedings. As OCC itself states in its Memo Contra, “the present cases only involve a prudency review of costs during 2018-2020.” (*Id.* at 8.) A prudency review is “a retrospective, factual inquiry.” *In re Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC, Opinion and Order (Aug. 20, 2014), citing *In re Syracuse Home Utils. Co.*, Case No. 86-12-GA-GCR, Opinion and Order at 10 (Dec. 30, 1986). It is, said differently, “backward-looking.” *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶ 32. In such a review, “a prudent decision is one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made.” *In re Application of The Dayton Power and Light Company*, Opinion and Order at 6 (Aug. 20, 2014), citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999) (further citation omitted). So even if “OVEC prepared a forecast in 2021 showing that the rider will be a net charge for the entire period,” per OCC’s hypothetical example (OCC Memo Contra at 8), the Commission could not use that forecast to determine the prudency of any EDU’s actions in 2018, 2019, or 2020. The prudency of the EDUs’ actions in those years must be based on what the EDUs knew, or should have known, in those years.

Moreover, the Commission has no authority to condition cost recovery under the LGR on a demonstration that the rider will ultimately be a net credit. OCC cites to inapposite Michigan

precedent in an apparent attempt to analyze OVEC under an inapplicable standard. (OCC Memo Contra at 10.) Ohio law does not require the LGR to provide a net credit to customers between 2020 and 2030. Instead, the statute caps “the monthly charge *or* credit” under the LGR at \$1.50 per customer per month for residential customers; directs the Commission to “establish comparable monthly caps for [other customer classes] at \$1,500 per customer or less; and authorizes EDUs to defer *any* “remaining prudently incurred costs as a regulatory asset or liability” for future recovery. (Emphasis added.) R.C. 4928.148(A)(2). The LGR could theoretically result in customer charges *every month through December 2030* under R.C. 4928.148, so long as the costs underlying those charges were prudently incurred.

Asking the Commission to interpret “prudently incurred costs” to mean costs that do not “exceed PJM market prices” (OCC Memo Contra at 10) would be asking the Commission to rewrite the statute. The Commission cannot do that. “The PUCO lacks authority to ‘legislate in its own right’ and may not substitute its own test for the one adopted by the General Assembly.” *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, at ¶ 34, quoting *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d at 166, 423 N.E.2d 820. For that reason, the post-audit-period discovery that OCC is seeking from OVEC is not “relevant to the subject matter of the[se] proceeding[s]” and is not “reasonably calculated to lead to the discovery of admissible evidence.” Ohio Adm.Code 4901-1-16(B).

For the reasons provided in the EDU’s original joint motion and above, the Commission should grant the EDUs’ and OVEC’s motion to quash the subpoena and prohibit OCC from seeking documents or information that relate to, and/or were created or developed after, the audit periods at issue in each proceeding, that is otherwise beyond the scope of discovery.

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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 20th day of December, 2021, via electronic transmission.

/s/ Steven T. Nourse

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Summary: Motion Motion to Quash Subpoena electronically filed by Mr. Steven T.
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