

**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 OVEC’S MOTION TO QUASH THE 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, the Utilities) charged their customers to subsidize two aging coal plants that they own and that Ohio Valley Electric Corporation (OVEC) operates.<sup>1</sup> Despite the Commission's appropriate review of the reasonableness and prudence of the costs that customers are being charged regarding the two aging coal plants (one of which is located in Indiana), the Utilities and now OVEC seek to thwart the Commission's review and prevent parties from obtaining information that is relevant to the costs associated with OVEC that are assessed to customers and the Commission's review of those costs.

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, unreasonable, or not in the best interests of customers.<sup>2</sup> OMAEG and Kroger have also opposed previous attempts by the Utilities to limit parties' discovery rights or parties' use of the various discovery tools in some of the above-captioned proceedings.<sup>3</sup>

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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).

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 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 respective OVEC case<sup>6</sup> and on December 1, 2021, filed a second Motion to Quash the Subpoena joined by Duke and AEP.<sup>7</sup> Thereafter, on December 16, 2021, OVEC filed its own Motion to Quash the Subpoena accompanied by a one sentence memorandum in support stating that it was incorporating the arguments set forth in AES Ohio’s November 19, 2021 Motion to Quash the Subpoena and the Utilities’ December 1, 2021 Motion to Quash the Subpoena.<sup>8</sup> In order for OVEC’s Motion to Quash the Subpoena to be granted, it (OVEC, not the Utilities) must demonstrate that the Subpoena is “unreasonable and oppressive.”<sup>9</sup> OVEC cannot meet this burden.

First, the Utilities do not have standing to contest the Subpoena to non-party OVEC because the Utilities themselves will not face any burden, let alone an unreasonable or oppressive burden from parties deposing an OVEC representative. Additionally, the Utilities do not have standing to raise arguments on behalf of another entity and it is improper for the Utilities to make such argument for or on behalf of OVEC. To date, neither the Utilities nor OVEC have made any

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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 the Subpoena, Case No. 20-165-EL-RDR (November 19, 2021).

<sup>7</sup> The Utilities’ Joint Motion to Quash the 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 (December 1, 2021).

<sup>8</sup> See OVEC’s Motion to Quash the 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 (December 13, 2021).

<sup>9</sup> See Ohio Adm. Code 4901-1-25(C).

attempt to demonstrate the burden that *OVEC itself* would face from the Subpoena. Accordingly, OVEC’s Motion to Quash the Subpoena should be denied for that reason alone.

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>10</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, OVEC is unlawfully attempting to prevent parties’ reasonable and ordinary use of discovery in a Commission proceeding.

Additionally, it is improper for OVEC to simply incorporate by reference the Utilities’ arguments, as the Utilities do not have standing to challenge the subpoena. In the instant circumstance, OVEC’s interests are separate and distinct from the Utilities, with regard to the subpoena of an OVEC representative. Given these separate interests, OVEC cannot rely on the Utilities’ arguments and incorporate them as its own.

Nonetheless, considering OVEC’s arguments incorporated from the Utilities’ Motions to Quash, OVEC has 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>11</sup> This recommendation has no basis in Ohio law or the Commission’s rules and if adopted

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<sup>10</sup> See Ohio Adm. Code 4901-1-16(B).

<sup>11</sup> See the Utilities’ Joint Motion to Quash the Subpoena at 4, 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).

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 OVEC's 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.

## II. ARGUMENT

### A. The Commission Should Deny The Motion to Quash the Subpoena Because OVEC Relies on Parties Who Lack Standing Under Ohio Law.

The Supreme Court of Ohio has stated that, “[s]tanding’ is defined at its most basic as ‘[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.’”<sup>12</sup> “To have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties.’<sup>13</sup> “Third-party standing is ‘not looked favorably upon. . . .’”<sup>14</sup> Ohio courts have further 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>15</sup>

As explained extensively in OMAEG and Kroger's Joint Memoranda Contra filed in the above-captioned proceedings on December 6, 2021 and December 16, 2021 respectively, the

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<sup>12</sup> *Ohio Pyro v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 381 (2007) (citing Black's Law Dictionary at 1442, Eighth Edition).

<sup>13</sup> *Util. Service Partners, Inc. v. Pub. Util. Comm'n of Ohio*, 124 Ohio St.3d 284, 294 (2009) (quoting *City of N. Canton v. City of Canton*, 114 Ohio St.3d 253 at ¶14).

<sup>14</sup> *Id.*

<sup>15</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).

Utilities lack standing to challenge the Subpoena on Non-Party OVEC's behalf.<sup>16</sup> The Subpoena at issue does not require any action from the Utilities and therefore they do not face any "actual or imminent injury." Given that the Utilities' arguments are not valid as they do not have standing, OVEC's incorporation of and reliance on those misplaced arguments are equally flawed and should be rejected.

Additionally, neither the Utilities nor OVEC have proffered any arguments as to why OVEC, the entity issued the Subpoena, would face oppression or an undue burden from the Subpoena. Without such demonstration as required by the rules, OVEC's Motion to Quash the Subpoena should be denied.

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

Notwithstanding the issue of relying on arguments by the Utilities that do not have standing, OVEC itself has not and 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

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<sup>16</sup> See OMAEG and Kroger's Joint Memorandum Contra AES Ohio's Motion to Quash the Subpoena (December 16, 2021); OMAEG and Kroger's Joint Memorandum Contra the Utilities' Joint Motion to Quash the Subpoena (December 16, 2021).

documents and things or permission to enter upon land or other property, *depositions*, and requests for admission.”<sup>17</sup>

OVEC, through its incorporation of the Utilities’ Joint Motion to Quash the Subpoena, has 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>

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 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

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

<sup>18</sup> See the Utilities’ Joint Motion to Quash the Subpoena at 3, 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>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).

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

OVEC, through its incorporation of the Utilities' Joint Motion to Quash the Subpoena, 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

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

<sup>21</sup> See the Utilities' Joint Motion to Quash the Subpoena at 3-4, 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>22</sup> See Ohio Adm. Code 4901-1-16(A).



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 OVEC's Motion to Quash the Subpoena 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 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, the 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 and would appear to be burdensome and oppressive on the OVEC representative, as well as the intervenors to all five cases. As discussed above, there is a substantial overlap among the cases because all of the cases concern the reasonableness and prudence of the costs related to the same two aging coal plants that are recovered through Commission-approved recovery mechanisms and AES Ohio, AEP, and Duke, which 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.

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

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

### 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 20, 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**

Summary: Memorandum Joint Memorandum Contra OVEC's Motion to Quash the Subpoena electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group and The Kroger Co.