

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

ENTRY

Entered in the Journal on December 21, 2021

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved AEP Ohio's application for an ESP for the period of June 1, 2015, through May 31, 2018, pursuant to R.C. 4928.143. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (*ESP 3 Case*), Opinion and Order (Feb. 25, 2015), Second Entry on Rehearing (May 28, 2015), Fourth Entry on Rehearing (Nov. 3, 2016), Seventh Entry on Rehearing (Apr. 5, 2017). Among other matters, the Commission authorized AEP Ohio to establish a placeholder Power Purchase Agreement (PPA) Rider and required AEP Ohio to justify any future request for cost recovery in a separate proceeding. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 20-22, 25-26.

{¶ 4} Subsequently, in Case No. 14-1693-EL-RDR, et al., the Commission modified and approved a stipulation and recommendation pertaining to AEP Ohio's proposal to populate the placeholder PPA Rider approved in the *ESP 3 Case*. *In re Ohio Power Co.*, Case

No. 14-1693-EL-RDR, et al. (*PPA Rider Case*), Opinion and Order (Mar. 31, 2016), Second Entry on Rehearing (Nov. 3, 2016), Fifth Entry on Rehearing (Apr. 5, 2017). The Commission directed that the PPA Rider be subject to an annual audit. *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 89-90.

{¶ 5} In Case No. 16-1852-EL-SSO, et al., the Commission modified and approved a stipulation and recommendation, which authorized AEP Ohio to implement an ESP for the period of June 1, 2018, through May 31, 2024, and provided for the continuation of the PPA Rider. *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018) at ¶ 53.

{¶ 6} By Entry dated January 15, 2020, the Commission directed Staff to issue a request for proposal for the audit services necessary to assist the Commission with the audit of AEP Ohio's PPA Rider for the period of January 1, 2018, through December 31, 2019.

{¶ 7} On March 11, 2020, the Commission selected London Economics International LLC (LEI) to conduct the prudency and performance audit of AEP Ohio's PPA Rider. Confidential and public versions of LEI's audit report were filed on September 16, 2020, in Case No. 18-1004-EL-RDR, and on September 17, 2020, in Case No. 18-1759-EL-RDR.

{¶ 8} By Entry dated January 19, 2021, the attorney examiner granted motions to intervene in these proceedings filed by the Ohio Consumers' Counsel (OCC) and Industrial Energy Users-Ohio. On September 10, 2021, the attorney examiner also granted motions for intervention filed by Ohio Energy Group, Ohio Manufacturers' Association Energy Group (OMAEG), The Kroger Co. (Kroger), Ohio Partners for Affordable Energy, and Natural Resources Defense Council.

{¶ 9} On October 5, 2021, the attorney examiner established a procedural schedule for these cases, including an evidentiary hearing to commence on January 12, 2022.

{¶ 10} On November 9, 2021, OCC filed a motion for a subpoena duces tecum for a representative of the Ohio Valley Electric Corporation (OVEC) to testify at a deposition in these proceedings, as well as in three other pending cases, and to produce a number of designated documents in advance of the deposition. *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. The subpoena was signed by the attorney examiner.

{¶ 11} On December 1, 2021, a motion to quash the subpoena was filed by AEP Ohio, Duke Energy Ohio, Inc., and The Dayton Power and Light Company d/b/a AES Ohio (collectively, the EDUs). In their motion, the EDUs argue that the Commission should not permit OCC, for purposes of deposing an OVEC representative, to consolidate separate proceedings that have distinct objectives and involve different companies, audit periods, and cost recovery mechanisms. According to the EDUs, the Commission's rules do not allow the scheduling of a single deposition to gather information for multiple, unconsolidated proceedings. The EDUs add that, even if such a deposition were permitted, it would cause procedural and evidentiary problems, such as numerous relevance objections and difficulties in ensuring that the deposition transcript is sufficiently clear and comprehensible. The EDUs contend that, if OCC is permitted to question an OVEC representative for the various cases, OCC must conduct multiple depositions. Additionally, the EDUs assert that the Commission should protect OVEC from testifying on matters that are beyond the scope of each of the proceedings. The EDUs note that, in audit proceedings, the Commission has generally limited the scope of the review to the audit period and has not permitted discovery relating to matters outside of that period. The EDUs, therefore, argue that the OVEC representative should not be required to produce certain designated information that is outside of the audit period under review.

{¶ 12} On December 13, 2021, OVEC filed a motion to quash the subpoena served by OCC. In support of its motion, OVEC states that it incorporates the arguments asserted in the EDUs' motion.

{¶ 13} On December 16, 2021, memoranda contra the EDUs' motion to quash were filed by OCC and jointly by Kroger and OMAEG. In its memorandum, OCC asserts that the Commission should deny the EDUs' motion to quash because the EDUs have not provided any specific grounds to establish that the OVEC deposition would be unreasonable or oppressive for them, as required under Ohio Adm.Code 4901-1-25(C). OCC adds that it has a right to take depositions under R.C. 4903.082 and the Commission's rules. Further, OCC argues that it seeks to obtain information that is relevant to whether OVEC's costs are reasonable and prudent, which constitutes information that is "relevant to the subject matter of the proceeding" or "reasonably calculated to lead to the discovery of admissible evidence" and, therefore, satisfies the requirements of Ohio Adm.Code 4901-1-16(B). Although OCC acknowledges that the Commission generally limits discovery to matters occurring during the audit period, OCC contends that any information that it seeks from outside the audit period is relevant to the present cases, because the Commission is concerned with OVEC costs over the entire period from 2018 until the end of the Legacy Generation Rider in 2030. Additionally, OCC contends that a party may notice a single deposition to be held in multiple proceedings if the discovery sought is relevant to each of the cases. Nonetheless, OCC states that, in light of the EDUs' opposition to a consolidated deposition, OCC will file separate notices of deposition in each of the audit cases, unless the Commission rules otherwise. OCC further states that it will proceed first with a deposition in AEP Ohio's proceedings, with the OVEC deposition for those cases to be scheduled for December 22, 2021.

{¶ 14} In their joint memorandum, Kroger and OMAEG argue that the Commission should deny the EDUs' motion to quash because the EDUs lack standing to challenge a subpoena served on OVEC. Kroger and OMAEG contend that the EDUs' motion makes no

mention of any purported injury that they would suffer if an OVEC representative is required to appear for a deposition. In addition, Kroger and OMAEG assert that the Commission should deny the motion to quash, as the noticed deposition is a reasonable and ordinary use of the parties' discovery rights under R.C. 4903.082 and Ohio Adm.Code 4901-1-16(B) and is reasonably calculated to lead to the discovery of admissible evidence. Noting that information from outside of the audit period may be relevant for many purposes, Kroger and OMAEG claim that the EDUs' contention that the subpoena seeks irrelevant information is overly simplified, is not based in Ohio law, and ignores the substantial overlap of the various cases. Finally, Kroger and OMAEG maintain that the Commission should reject the EDUs' argument that the parties are required to conduct multiple depositions of the same OVEC representative, which Kroger and OMAEG believe would be unreasonable, unduly burdensome, and wasteful of the time and resources of the parties.

{¶ 15} On December 16, 2021, OCC filed a notice of deposition in these proceedings. The notice states that OCC will take the deposition of a designated OVEC representative on December 22, 2021.

{¶ 16} On December 20, 2021, Kroger and OMAEG filed a joint memorandum contra OVEC's motion to quash the subpoena. Kroger and OMAEG argue that OVEC's motion should be denied for similar reasons to those asserted in their memorandum contra the EDUs' motion to quash. Kroger and OMAEG contend that it was improper for OVEC to simply incorporate by reference the EDUs' arguments, as the EDUs do not have standing to challenge the subpoena. Kroger and OMAEG also reiterate that the noticed deposition is a reasonable and ordinary use of the parties' discovery rights and that the parties should not be required to conduct multiple depositions of the same OVEC representative.

{¶ 17} On December 20, 2021, the EDUs filed a reply in support of their motion to quash. As to whether a single OVEC deposition is appropriate and permitted for multiple proceedings, the EDUs note that the issue is now moot, in light of OCC's agreement to take

separate depositions of an OVEC representative in the respective cases. With respect to whether the EDUs have standing to contest the subpoena, the EDUs claim that any party affected by a subpoena may move to quash it under Ohio Adm.Code 4901-1-25(C) and that, in any event, this issue is also moot, because OVEC filed its own motion to quash in which it joined the EDUs' motion. As a final matter, the EDUs reiterate that the Commission's audit proceedings generally focus on matters occurring during the audit period and that discovery relating to matters outside the audit period is generally prohibited. The EDUs, therefore, request that OCC be prohibited from seeking information that relates to a point in time after the audit period at issue in each proceeding and that is otherwise beyond the scope of discovery.

{¶ 18} The attorney examiner has reviewed the motions to quash filed by the EDUs and OVEC. Regarding the question of standing, the attorney examiner is not persuaded by the arguments of OCC, Kroger, and OMAEG, as Ohio Adm.Code 4901-1-25(C) permits any party to move to quash a subpoena on the grounds that it is unreasonable or oppressive. As to whether OCC should be permitted to conduct a single OVEC deposition in multiple, unconsolidated proceedings, the attorney examiner finds that the issue is moot, in light of OCC's agreement to conduct separate depositions in each of the cases. Finally, with respect to the scope of the documents designated to be produced by the subpoena, the attorney examiner notes that OCC seeks to obtain reports, forecasts, policies, and other information that pertains to 2020 and 2021, which is beyond the period under review in these proceedings – January 1, 2018, through December 31, 2019. The attorney examiner finds that this information is not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence. Accordingly, consistent with these findings, the motions to quash should be granted, in part, and denied as moot, in part.

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the motions to quash filed by the EDUs and OVEC be granted, in part, and denied as moot, in part. It is, further,

{¶ 21} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Sarah J. Parrot

By: Sarah J. Parrot
Attorney Examiner

GAP/mef

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in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

Summary: Attorney Examiner Entry granting, in part, and denying, in part, the motions to quash. electronically filed by Ms. Mary E. Fischer on behalf of Sarah J. Parrot, Attorney Examiner, Public Utilities Commission of Ohio