

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1004-EL-RDR
Company for 2018.)	
)	
In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1759-EL-RDR
Company for 2019.)	

**REPLY MEMORANDUM IN SUPPORT OF OCC’S MOTION FOR SUBPOENAS
DUCES TECUM FOR PUCO AUDITOR, PUCO STAFF AND PUCO-DESIGNATED
REPRESENTATIVE MAKING OR CONTRIBUTING TO THE AUDIT REPORT
TO ATTEND AND TESTIFY AT EVIDENTIARY HEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The PUCO Staff does not oppose OCC’s motion to subpoena the Auditor in this case that is about how Ohioans have been made to pay lots of money to AEP to subsidize dirty coal plants. The PUCO Staff does, however, oppose OCC’s motion to subpoena the PUCO Staff members who asked the Auditor to delete portions of the audit report favorable to consumers.

The PUCO Staff argues that “It is likely that Staff will have a witness, or witnesses, ... who can testify as to the issues raised in OCC’s subpoena but Staff -not OCC- should make that determination.”¹ The Staff argues that "OCC should wait until Staff files its testimony (on December 29, 2021) to determine whether a Motion for Subpoena is necessary.”² But, under the rule, the PUCO should allow OCC to exercise its right to subpoena “any person making or contributing” to the Staff Report.

¹ PUCO Staff Memorandum Contra at 4 (Dec. 16, 2021).

² *Id.*

II. ARGUMENT

O.A.C. 4901-1-28(E) sets out the rule that governs proceedings where investigations are performed by the Staff and the report of the investigation is filed. Under the rule “any person making or contributing to the [staff] report may be subpoenaed to testify at the hearing.” The rule requires that the motion for subpoena “must be filed with the commission no later than ten days prior to the commencement of the hearing or, if expedited treatment is requested, no later than five days prior to the commencement of the hearing.”³ In accordance with the rule, on December 1, 2021, OCC filed a motion for subpoenas seeking to require specific person(s) contributing to the staff report to attend the hearing.

The PUCO Staff argues that OCC’s motion for subpoena is premature, insisting that OCC should wait until the Staff files its testimony, because “It is likely that Staff will have a witness, or witnesses, testify who can testify as to the issues raised in OCC’s subpoena.”⁴ Staff’s position is not well-founded. The point of the subpoena is that OCC is not relying upon the Staff’s decision of whether it will present a witness to testify, or who that witness will be. OCC is affirmatively exercising its rights to require the Staff to produce the persons making or contributing to the report.

OCC’s need for the subpoenas is based, among other things, on the PUCO Staff’s apparent (successful) effort to have certain pro-consumer information removed from the audit report. OCC obtained emails through a public records request showing that Staff member Mahila Christopher asked the auditor to remove its key finding that “keeping the plants running does not

³ *Id.*

⁴ *Id.*

seem to be in the best interests of the ratepayers.”⁵ Ms. Christopher worked under the direction of another Staff member, identified in the emails as “PUCO Admin,” who gave “final acquiescence...regarding the overall tone of the draft report.”⁶

The auditor, at the urging of the Staff, removed this language from the final version of its report: “keeping the plants running does not seem to be in the best interests of the ratepayers.” from the final version of the audit report. The auditor took this step to sanitize its concerns even though one of the PUCO’s objectives for the audit was to determine whether “the Company’s actions were in the best interest of retail ratepayers.”⁷ By getting the auditor to remove this key finding from the final version of the audit report, these two Staff members certainly contributed to the audit report and are subject to subpoena.

The auditor’s original language that “keeping the plants running does not seem to be in the best interests of the ratepayers”⁸ was an important opinion for consumer protection. As OCC stated in its comments, the PUCO should restore that language to the audit report.⁹ The final audit report without this language was much different than the draft audit report that contained this language. The two Staff members certainly “contributed” to the final version of the report and, under O.A.C. 4901-1-28(E), OCC is entitled to subpoena them for hearing.

⁵ Motion for Subpoenas at Attachment A (Dec. 1, 2021).

⁶ *Id.*

⁷ *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018 and 2019*, Case Nos. 18-1004-EL-RDR & 18-1759-EL-RDR, Entry, Attachment: Request for Proposal No. RA20-PPA-1: An Independent Audit of the Power Purchase Agreement Rider of Ohio Power Company at 4 (Jan. 15, 2020).

⁸ Motion for Subpoenas at Attachment A (Dec. 1, 2021).

⁹ OCC Initial Comments at 2-6 (Nov. 12, 2021).

III. CONCLUSION

OCC respectfully requests the PUCO to grant OCC's motion for subpoena. The auditor, Mahila Christopher and the Staff member identified as "PUCO Admin," all "contributed" to the final version of the audit report. OCC is therefore entitled to subpoena them to appear and testify at hearing under O.A.C. 4901-1-28(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Memorandum was served upon the persons listed below by electronic transmission this 23rd day of December 2021.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Reply Reply Memorandum in Support of OCC's Motion for Subpoenas
Duces Tecum for PUCO Auditor, PUCO Staff and PUCO-Designated
Representative Making or Contributing to the Audit Report to Attend and Testify at
Evidentiary Hearing by Office of the Ohio Consumers' Counsel electronically filed
by Ms. Deb J. Bingham on behalf of Finnigan, John