

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the OVEC Generation)	
Purchase Rider Audits Required by)	
R.C. 4928.148 for Duke Energy Ohio,)	Case No. 21-477-EL-RDR
Inc., the Dayton Power and Light)	
Company, and AEP Ohio)	

**MEMORANDUM IN OPPOSITION OF
OHIO POWER COMPANY ON BEHALF OF ITS AFFILIATE, AMERICAN
ELECTRIC POWER COMPANY, INC.,
THE MOTION FOR A SUBPOENA DUCES TECUM BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. Introduction

Ohio Power Company ("AEP Ohio") respectfully opposes, on behalf of its affiliate, American Electric Power Company, Inc. ("AEP Inc."), the the Motion for a Subpoena Duces Tecum ("Motion") served by The Office of the Ohio Consumers' Counsel ("OCC") that was filed in the above-captioned proceeding on November 14, 2022. The documents that OCC has moved to subpoena are irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. Moreover, those documents are related to a confidential U.S. Securities and Exchange Commission ("SEC") investigation with which OCC should not be permitted to interfere. If the Commission does grant the Motion for a Subpoena Duces Tecum, however, AEP Ohio asks that the Commission allow AEP Inc. to produce the subpoenaed documents confidentially.

On November 14, 2022, OCC moved to subpoena copies of subpoenas that AEP Inc. received from the SEC) in May 2021 and August 2022, along with any other subpoenas received by any AEP entity relating to Ohio House Bill 6 (2019) (“HB 6”). AEP Inc. first disclosed its receipt of the May 2021 subpoena in its July 2021 Form 10-Q, and the receipt of its August 2022 subpoena in its October 2022 Form 10-Q. (Motion at 1 n. 1.) The subpoenas, as described in AEP Inc.’s October 2022 Form 10-Q, “seek[] various documents, including documents relating to the passage of HB 6 and documents relating to AEP’s policies and financial processes and controls.” (Motion, Mem. Supp. at 1 and Attachment at 2.) AEP Inc. is cooperating fully with the SEC’s investigation.

The subpoena attached to OCC’s Motion is not effective, because no person from the Commission has signed the subpoena. *See* Ohio Adm.Code 4901-1-25(A). Nevertheless, to the extent that the Commission has chosen to postpone signing the subpoena in order to permit AEP Inc. an opportunity to respond, AEP Ohio on behalf of its affiliate, AEP Inc., respectfully requests that the Commission deny OCC’s Motion and leave the subpoena unsigned. If the Commission does choose to sign the subpoena, AEP Ohio respectfully requests that it be permitted to provide the subpoenaed documents subject to confidentiality.

II. The Commission should deny OCC’s Motion.

A. The SEC’s subpoenas to AEP Inc. are irrelevant to this proceeding.

Under the Commission’s rules, “[t]he attorney examiner assigned to the case, or the legal director or deputy legal director or their designee, will review [a motion for a subpoena] and, *if appropriate*, sign the subpoena.” (Emphasis added.) Ohio Adm.Code 4901-1-25(A)(1). It would not be appropriate to sign the subpoena that OCC filed.

The purpose of this proceeding is to “determine the prudence and reasonableness of the actions of EDUs with ownership interests” in the Ohio Valley Electric Corporation (“OVEC”) during calendar year 2020. Entry ¶¶ 3, 5 (May 5, 2021). In 2019, the Ohio General Assembly

passed, and Governor DeWine signed, HB 6, which included a new statute, R.C. 4928.148. That statute directed the Commission to adopt “a nonbypassable rate mechanism” for “retail recovery of prudently incurred costs related to a legacy generation resource ... from customers of all electric distribution utilities in this state.” R.C. 4928.148(A). It also required the Commission to “determine * * * the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in [OVEC], including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable.” R.C. 4928.148(A)(1).

AEP Ohio is an electric distribution utility and is a party to this proceeding. On July 14, 2021, the Commission selected London Economics International LLC (“LEI”) “to assist the Commission with the prudence and performance audit of the Legacy Generation Rider of * * * AEP Ohio for the period from January 1, 2020 through December 31, 2020.” Entry ¶ 1 (July 14, 2021). LEI filed its audit report on December 17, 2021. The Commission has yet to establish a procedural schedule for this proceeding. AEP Inc. is not an electric distribution utility and is not a party to this proceeding.

A prudency review, like the one the Commission is undertaking here, 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). 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).

Moreover, in an audit proceeding, generally speaking, “[t]he Commission has historically only permitted a review of matters during the audit period involved in [the] case.” *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*, Case No. 05-219-GA-GCR, Entry, ¶ 10-11 (July 28, 2006). *Cf. In re Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-101-EL-EFC, Opinion and Order, 1994 Ohio PUC LEXIS 393, *95-96 (May 25, 1994) (declining to review the appropriateness of the retirement of a specific dragline because it was “a matter outside the review period of the audits conducted in this case.”). Consequently, as a general matter, the Commission has not permitted discovery relating to matters outside the audit period. *See In re Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power and Light Company*, Case No. 85-07-EL-EFC, Entry, 1985 Ohio PUC LEXIS 806, *3-5 (September 3, 1985) (granting in part and denying in part a motion to compel filed by OCC, and holding that “[t]he attorney examiner * * * will not order the company to provide data outside the audit period”).

The subpoena that OCC has filed here is entirely unrelated to the purpose of this proceeding. OCC is not seeking documents related to the prudence and reasonableness of AEP Ohio’s actions with regard to OVEC during calendar year 2020. Instead, OCC says, the documents it has subpoenaed “relate to AEP Inc.’s efforts to pass House Bill 6” in the year before the audit period. (Motion, Mem. Supp. at 4.) OCC is, in other words, engaged in a fishing expedition, with the hopes of ultimately finding information that will call into question HB 6, R.C. 4928.148, and the recoverability of *any* OVEC-related costs.

OCC has sought similar discovery, unsuccessfully, in other OVEC-related audit proceedings. In the Commission’s review of the prudence and reasonableness of AEP Ohio’s actions with regard to costs recovered through that company’s PPA Rider for 2018 and 2019, for example, OCC sought

discovery regarding AEP Ohio's establishment of the PPA Rider in 2016. The Commission granted AEP Ohio's motion for a protective order against that discovery. In particular, the Attorney Examiner held that "[i]nformation regarding the basis for AEP Ohio's decision to include the OVEC PPA in the PPA Rider is * * * beyond the scope of these proceedings, as the Commission has already authorized the OVEC agreement's inclusion in the rider in the *PPA Rider Case* [Case Nos. 14-1693-EL-RDR, *et al.*] and, more recently, approved the continuation of the rider in the *ESP 4 Case* [Case Nos. 16-1852-EL-SSO, *et al.*]." *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Co. for 2018*, Case Nos. 18-1004-EL-RDR, Entry at ¶ 15 (Dec. 23, 2021).

For the same reason, "AEP Inc.'s efforts to pass House Bill 6" are beyond the scope of these proceedings. The statute that directed the Commission to adopt the Legacy Generation Resource (LGR) Rider went into effect in October 2019. The Commission established the LGR Rider in November 2019, as it was required to do by statute. *See In the Matter of Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148*, Case No. 19-1808-EL-UNC, Entry ¶ 38 (Nov. 21, 2019). And R.C. 4928.148 directs the Commission to review "the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource * * * during calendar year 2020." R.C. 4928.148(A)(1). OCC's subpoena, which relates to the actions of AEP Inc. (not AEP Ohio) during calendar year 2019 or earlier (not during calendar year 2020) are clearly beyond the statutorily defined scope of this proceeding.

For all of these reasons, it would not be appropriate for the Commission to sign OCC's Motion to subpoena AEP Inc. The Commission should not allow OCC to use the Commission's subpoena powers to conduct an investigation of matters outside the scope of this proceeding and outside the Commission's jurisdiction.

III. If the Commission does grant OCC's Motion, it should allow AEP Inc. to produce the subpoenaed documents confidentially because SEC investigations are confidential.

While PUCO should deny the OCC's motion for subpoena for the reasons noted above, if, for any reason, the Commission grants the OCC's motion, AEP Ohio, on behalf of its affiliate AEP Inc., respectfully requests that any documents produced in response to the OCC's Subpoena remain confidential pursuant to an appropriately crafted protective order. In particular, AEP Ohio requests that the Commission prohibit the OCC from disclosing any materials received, to the extent responsive to the OCC's Subpoena, to any third parties, including but not limited to the public as well as the other utility companies that are currently or become parties to this proceeding. Investigations by the SEC are confidential, sensitive, and nonpublic. *See* 17 C.F.R. § 203.5 ("Non-public formal investigative proceedings."). Moreover, the SEC presumes information generated by SEC staff during an investigation to be confidential and nonpublic. *See SEC Enforcement Manual*, 5.1 ("Disclosure of Information and Access Requests," Nov. 27, 2017). This presumption exists to preserve the integrity of the investigative process (again, a factor in considering the OCC's motion) as well as to protect persons and entities where the SEC determines an enforcement action is not necessary or appropriate. *SEC, Filing Guidance and Confidentiality*.¹

Accordingly, if, the Commission grants OCC's motion for subpoena, AEP Ohio requests that any SEC records produced are covered by a Protective Order agreed to by the parties to this proceeding (or otherwise adopted by the Commission for use in this proceeding). If OCC has a legitimate interest in reviewing the documents, it does not need to disclose them publicly or to third parties.

CONCLUSION

¹ <https://www.sec.gov/complaint/info>.

For the reasons provided above, AEP Inc. respectfully requests that the Commission deny OCC's motion for subpoena. Alternatively, if the Commission does grant the OCC's motion, it should order the documents to be maintained confidentially by OCC.

Respectfully submitted,

/s/ Steven T. Nourse

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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 *Memorandum in Opposition to Motion for a Subpoena Duces Tecum* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29th day of November, 2022, via electronic transmission.

/s/ Steven T. Nourse
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Case No(s). 21-0477-EL-RDR

Summary: Memorandum MEMORANDUM IN OPPOSITION OF OHIO POWER COMPANY ON BEHALF OF ITS AFFILIATE, AMERICAN ELECTRIC POWER COMPANY, INC. THE MOTION FOR A SUBPOENA DUCES TECUM BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company