

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	Case No. 22-0900-EL-SSO
The Dayton Power and Light Company d/b/a		
AES Ohio for Approval of Its Electric	:	
Security Plan		
	:	
In the Matter of the Application of The		Case No. 22-0901-EL-ATA
Dayton Power and Light Company d/b/a	:	
AES Ohio for Approval of Revised Tariffs		
	:	
In the Matter of the Application of		Case No. 22-0902-EL-AAM
The Dayton Power and Light Company d/b/a	:	
AES Ohio for Approval of Accounting		
Authority Pursuant to Ohio Rev. Code	:	
§ 4905.13		

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**AES OHIO'S MOTION TO QUASH SUBPOENA**

**EXPEDITED TREATMENT REQUESTED**

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One of the Attorney Examiners to this case has signed a Subpoena Duces Tecum requiring AES Ohio employee Patrick Donlon to appear and testify at the hearing in this matter, and to bring a voluminous amount of documents with him. AES Ohio has no objection to the requirement that Mr. Donlon appear in person to testify at the hearing. In fact, AES Ohio intends to call Mr. Donlon in its case in chief in support of his testimony that was filed on September 27, 2022.

However, pursuant to O.A.C. 4901-1-12(C), the Commission should quash the portion of the subpoena that requires Mr. Donlon to bring documents with him, for the following reasons: (1) the subpoena is an attempt to conduct discovery after the discovery deadline; (2) OCC already has all of the documents that it seeks; (3) responding to the subpoena would be unduly burdensome immediately before a hearing; (4) OCC has not made any showing that the

documents from other cases that it seeks are relevant in this case; and (5) settlement communications are not subject to discovery.

AES Ohio has not consulted with other parties regarding this motion. The Commission should decide the motion on an expedited basis, given that the hearing starts on May 2.

Respectfully submitted,

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## **MEMORANDUM IN SUPPORT OF AES OHIO'S MOTION TO QUASH SUBPOENA**

The Commission should quash OCC's subpoena to the extent that it requires Mr. Donlon to bring documents to the hearing for the following reasons:

First, OCC asserts (p. 3) that the subpoena would "facilitate[ ] parties' ability to conduct discovery." However, the deadline to conduct discovery was April 17. April 3, 2023 Entry. Further, O.A.C. 4901-1-17(A) provides that "Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing." (Emphasis added.) The Commission should not allow OCC to circumvent the discovery deadline by issuing a hearing subpoena and requesting documents from a Company employee. In re the Complaint of Buckeye Energy Brokers, Inc., Complainant, v. Palmer Energy Company, Respondent, Case No. 10-693-EL-CSS, Entry, paras. 2, 5 (Mar. 30, 2011) ("Palmer Energy seeks to quash or limit the subpoena . . . that requires [its employee] to bring any documents to the hearing beyond what has already been produced in discovery. . . . Upon a review of the arguments raised, the attorney examiner determines that the motion to quash should be granted. In reaching this determination, the attorney examiner finds that documents addressed in Exhibit A to Mr. Frye's subpoena goes beyond the scope of the prior discovery and that to allow the subpoena to remain as drafted would in essence allow for the conducting of discovery beyond the previously established deadlines.")

Second, undersigned counsel believes that the documents that OCC seeks have already been produced to it or are publicly available.

Specifically, items (1) and (2) in OCC's subpoena have already been produced to OCC in this case (except settlement communications). As to item (3), no discovery requests

were served on AES Ohio in Case No. 20-140-EL-AAM. OCC was a party to the cases included in items (4) and (7), and served discovery requests asking AES Ohio to provide to OCC all of AES Ohio's discovery responses to other parties, and those documents were provided to OCC. As to items (5) and (6), all of the responsive documents were either produced in this case or are available on the PUCO's docket. In re the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37, Case No. 17-974-EL-UNC, Entry, pp. 23-24 (June 16, 2022) ("If requested documents have already been produced or are subject to ongoing production, those documents need not be produced again for these depositions, as requiring duplicate production would be unreasonable. . . . [T]he discovery deadline [\*25] has passed, and discovery is now closed. Although Ohio Adm.Code 4901-1-25(D) contemplates document production associated with a deposition, this rule cannot be used to circumvent a discovery deadline.")

Third, the request is unduly burdensome. For example, in this case alone, AES Ohio has produced over 6,000 pages of documents; many of these documents are Excel spreadsheets in Native form to which AES Ohio assigned one page number, but if printed would be many additional pages. Much more extensive discovery occurred in Case No. 16-0395-EL-SSO, in particular. It is thus unduly burdensome for Mr. Donlon to produce those documents, particularly since OCC both already has them and could have asked for them months ago. In re the Complaint of Brenda Fitzgerald and Gerald Fitzgerald, Complaint, v. Duke Energy Ohio, Inc., Respondent, Case No. 10-791-EL-CSS, Entry, para. 11 (April 25, 2011) ("With regard to the subpoena for Cindy Givens, Duke Energy stated that it has no problem with the portion of the subpoena requiring her to appear . . . . Duke Energy, however, does contest the document

production portion of the subpoena as being too burdensome. Complainants have requested that Ms. Givens bring to the hearing 'any notes or material, written or recorded, relevant to this case.' Complainants have conducted discovery in this case . . . . Discovery is now complete and complainants should now possess all relevant material. Complainants shall be responsible for bringing to hearing the 'notes or material, that they intend to introduce or use at hearing. The Commission agrees that the request is burdensome. . . . The motion to quash insofar as it pertains to the production of documents at hearing is granted.")

Fourth, OCC never explains how "[a]ll requests and responses" from cases other than this one are relevant in this case.

Fifth, to the extent items (2), (5) and (6) seek settlement communications, they are improper. Jan. 16, 2023 Opinion and Order, pp. 129-30 (Case No. 21-637-GA-AIR) ("the ruling of the attorney examiner precluding the cross-examination of witnesses regarding the content of settlement negotiations is entirely consistent with Commission precedent")

Finally, if the Commission does not quash the subpoena in its entirety, the Commission should require OCC to pay the reasonable costs (including attorneys' fees, document processing fees, printing costs) of responding, pursuant to O.A.C. 4901-1-25(C).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing AES Ohio's Motion to Quash Subpoena has been served via electronic mail upon the following counsel of record, this 24th day of April, 2023:

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Summary: Motion AES Ohio's Motion to Quash Subpoena electronically filed by Mr. Jeffrey S. Sharkey on behalf of The Dayton Power and Light Company.