

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MOTION FOR SUBPOENA *DUCES TECUM* FOR OHIO VALLEY ELECTRIC  
CORPORATION TO DESIGNATE A WITNESS(ES) FOR DEPOSITION UPON  
ORAL EXAMINATION AND PRODUCE DOCUMENTS  
AND  
REQUEST FOR EXPEDITED RULING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 21, 2023

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To protect Ohio consumers, OCC moves the PUCO to issue a subpoena *duces tecum* to the Ohio Valley Electric Corporation (“OVEC”). OVEC should designate one or more of its officers, agents, employees, or other duly authorized persons to testify on its behalf at deposition upon oral examination. OVEC’s designee(s) shall be cross-examined on matters known or reasonably available to OVEC, as described in OCC’s Memorandum in Support.

This case concerns subsidies that consumers of Ohio Power Company (“AEP”), Duke Energy Ohio, Inc. (“Duke”) and The Dayton Power and Light Company (“DP&L”) paid during 2020 for two antiquated coal plants. These utilities own shares of the coal plants<sup>1</sup> through OVEC. One of those plants is not even located in Ohio. These costs were

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<sup>1</sup> Ohio Valley Electric Corporation Annual Report (2020) at 1.

approved for collection under tainted House Bill 6<sup>2</sup> and they remain intact even though other parts of House Bill 6 have been repealed.

The Public Utilities Commission of Ohio (“PUCO”) hired an auditor to conduct a prudency audit to examine “the prudency of all costs and sales flowing through the [AEP, Duke and DP&L’s Legacy Generation Riders (“coal plant subsidy charge”)] and demonstrate that the Companies’ actions were in the best interest of retail ratepayers” during calendar year 2020.<sup>3</sup> The auditor investigated issues such as: how OVEC bills utilities; how OVEC operates its coal plants and bids the output into the PJM Day-Ahead Energy Market; OVEC’s environmental compliance spending; the power plant performance of the two units, capital expenditures, OVEC’s fuel and operation and maintenance related expenses, and OVEC’s capital budgeting process.<sup>4</sup>

As the actual operator of the plants, OVEC has this complete information. The Office of the Ohio Consumers’ Counsel (“OCC”) needs this information from OVEC to determine whether the costs and sales flowing through the coal plant subsidy charge were prudent and the utilities’ actions were in the best interest of retail ratepayers.

The subpoena requires the OVEC designee(s) to appear at OCC’s offices on September 22, 2023 at 10:00 a.m. to be subject to cross-examination by OCC, day to day, until cross- examination is completed. The subpoena also requires OVEC to produce certain documents to OCC by September 15, 2023.

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<sup>2</sup> R.C. 4928.148.

<sup>3</sup> Entry, RFP at 6 (May 5, 2021).

<sup>4</sup> Audit Reports (Dec. 17, 2021).

OCC requests an expedited ruling on its motion under O.A.C. 4901-1-12(C).  
OCC contacted parties to this case to determine if any party objected to the issuance of an expedited ruling without the filing of memoranda. OCC is unable to certify that no party has any objection to the issuance of an expedited ruling.

Respectfully submitted,

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/s/ John Finnigan  
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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The coal plant subsidies are an unfortunate legacy of tainted House Bill 6 that Ohio consumers continue to bear. OVEC operates two 1950's-era coal plants. Ohio electric distribution utilities share of the two coal plants is 33.83% of OVEC's costs. Ohio utilities are entitled to the same share of OVEC's output (Ohio Power – 19.93%, Duke – 9% and DP&L 4.9%.<sup>5</sup>) The OVEC coal plants' outdated technology is highly inefficient, so their cost to produce electricity greatly exceeds the PJM market price for electricity. Under the coal plant subsidy charge, the utilities' consumers subsidize the above-market costs of the coal plants.

This case involves many operational and financial issues relating to OVEC's coal plants. OVEC has this information and OCC needs to review it to determine whether the OVEC costs were prudent and reasonable. The information OCC seeks is relevant and reasonably calculated to lead to the discovery of admissible evidence and is therefore discoverable.<sup>6</sup>

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<sup>5</sup> See footnote 2, *supra*.

<sup>6</sup> O.A.C. 4901-1-16(B) (Emphasis added).

The PUCO has approved OCC's requests for subpoenas to obtain documents and to take discovery depositions of OVEC in the utilities' reconciliation rider cases involving 2019 OVEC costs.<sup>7</sup> The Attorney Examiner's July 7, 2023 Entry also scheduled an evidentiary hearing for October 17, 2023.<sup>8</sup> OCC therefore seeks a subpoena duces tecum to obtain needed information from OVEC.

## II. LAW AND ARGUMENT

### A. Issuing subpoenas to facilitate parties' discovery is within the PUCO's authority where, as here, the subpoenas seek information reasonably calculated to lead to the discovery of admissible evidence.

The PUCO's subpoena power, which facilitates parties' ability to conduct discovery, is grounded in Ohio law and rules. Attorney examiners are authorized to issue subpoenas.<sup>9</sup> "A party may \*\*\* in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested"<sup>10</sup> and "[a] subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code."<sup>11</sup>

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<sup>7</sup> See, e.g., Case No. 20-165-EL-RDR, Correspondence regarding return of service for subpoena (June 28, 2023); Case No. 18-1004-EL-RDR, Notice of Deposition (Dec. 16, 2021).

<sup>8</sup> Entry (July 7, 2023).

<sup>9</sup> R.C. 4901.18.

<sup>10</sup> O.A.C. 4901-1-21(F).

<sup>11</sup> O.A.C. 4901-1-25.

The scope of discovery is defined as follows:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the sought would be inadmissible at the hearing if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence.<sup>12</sup>

The PUCO rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>13</sup>

Under this standard, there are more than adequate grounds for granting OCC's motion for subpoena in the interest of consumer protection. The subpoena seeks information directly impacting OVEC's costs, which the utilities collected from consumers. All of these documents and testimony which OCC seeks are reasonably calculated to lead to the discovery of admissible evidence, as explained below.

**B. Under O.A.C. 4901-1-25, OCC is entitled to seek a subpoena *duces tecum* to command a designated representative(s) of OVEC to produce documents, attend and give testimony at deposition.**

When initially allowing the utilities to collect OVEC-related costs, the PUCO required periodic reviews where OVEC's costs would be subject to "rigorous review"<sup>14</sup> to determine whether the OVEC costs were prudent and reasonable.<sup>15</sup> In order to conduct this "rigorous review," a designated representative(s) of OVEC is needed to provide certain information regarding how it operates the plants.

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<sup>12</sup> O.A.C. 4901-1-16(B) (Emphasis added).

<sup>13</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

<sup>14</sup> *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Joint Stipulation and Recommendation at 7 (Dec. 14, 2015).

<sup>15</sup> R.C. 4928.148(A)(1).



OVEC is a public utility subject to the PUCO's jurisdiction.<sup>16</sup> The PUCO has approved motions to subpoena OVEC in other cases where OVEC had relevant information or information which appeared reasonably calculated to lead to the discovery of admissible evidence.<sup>17</sup> The Attorney Examiner denied a request of OVEC and AEP to quash a similar subpoena in the audit of AEP's 2018-2019 OVEC costs, to the extent that the subpoena requested information during the audit period.<sup>18</sup> The Attorney Examiner also approved OCC's request to subpoena OVEC for a discovery deposition in the case involving DP&L's 2019 OVEC costs.<sup>19</sup> The PUCO should also allow OCC to subpoena OVEC under the circumstances of this case.

OVEC employees prepare the financial forecasts that project whether OVEC's costs will exceed PJM market prices. OVEC employees made the daily unit commitment decisions into the PJM Day-Ahead Energy Market. OVEC employees decide on the environmental compliance strategies to keep the plants in compliance with EPA operating permits. OVEC employees prepare the capital budgets that estimate how much spending will be needed for environmental improvements. OCC is entitled to review OVEC documents and examine an OVEC representative(s) on operational matters,

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<sup>16</sup> See, e.g., *In the Matter of the Application of the Ohio Valley Electric Corporation for authority to issue evidence of indebtedness, in the form of long-term securities, to refinance financing arrangements relating to term loans and bonds issued by the Ohio Air Quality Development Authority and the Indiana Finance Authority, to provide credit enhancements, and to enter into interest management agreements*, Case No. 21-642-EL-AIS, Application and Statement (May 21, 2021).

<sup>17</sup> See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Sierra Club's Motion for a Subpoena Duces Tecum to Ohio Valley Electric Corporation (May 22, 2018).

<sup>18</sup> *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 and 18-1759-EL-RDR, Entry (Dec. 21, 2021).

<sup>19</sup> Case No. 20-165-EL-RDR, Correspondence regarding return of service for subpoena (June 28, 2023).

OCC therefore seeks a subpoena from a designated representative(s) of OVEC to testify at deposition upon oral examination and to produce certain documents on various topics relating to “the prudence of all costs and sales flowing through the [AEP, Duke and DP&L’s coal plant subsidy charge] and demonstrate that the Companies’ actions were in the best interest of retail ratepayers” during calendar year 2020.<sup>20</sup>

**C. An expedited ruling is requested**

OCC requests an expedited ruling on its motion under O.A.C. 4901-1-12(C). An expedited ruling is sought in light of the scheduled evidentiary hearing for October 17, 2023.<sup>21</sup> OCC seeks the information sought through deposition to prepare its testimony which is due to be filed on October 10, 2023.<sup>22</sup> OCC contacted parties to this case to determine if any party objected to the issuance of an expedited ruling without the filing of memoranda. OCC is unable to certify that no party has any objection to the issuance of an expedited ruling.

**III. CONCLUSION**

The PUCO opened this case to review “the prudence of all costs and sales flowing through the [reconciliation rider] and to demonstrate that the Company’s actions were in the best interest of retail ratepayers.”<sup>23</sup> The information OCC seeks from OVEC is needed for OCC’s advocacy on behalf of Ohio consumers and for a full investigation of

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<sup>20</sup> Entry, RFP at 6 (May 5, 2021).

<sup>21</sup> Entry (July 7, 2023).

<sup>22</sup> *Id.*

<sup>23</sup> Entry, Attachment at 4 (Jan. 29, 2020).

these issues. For the protection of consumers, OCC respectfully requests the PUCO grant this Motion for the reasons discussed above.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ John Finnigan  
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Assistant Consumers' Counsel

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(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Motion for Subpoena Duces Tecum was served upon the persons listed below by electronic transmission this 21<sup>st</sup> day of August 2023.

/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:

### **SERVICE LIST**

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STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
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Michael DeWine  
GOVERNOR



RECEIVED-BOOKETING PAV  
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PUCO

THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM

TO: Ohio Valley Electric Corporation  
c/o The Prentice-Hall Corporation System, Inc.  
3366 Riverside Drive, Suite 103  
Upper Arlington, Ohio 43221

Upon application of the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Valley Electric Corporation ("OVEC") is hereby ordered to designate one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, to be subject to deposition upon oral examination on September 22, 2023 at 10:00 a.m. at OCC's office at 65 East State Street, Suite 700, Columbus, Ohio 43215.

OVEC's designee(s) shall be subject to cross-examination by OCC, one after the other and day-to-day until examination is completed, on the following matters known or reasonably available to OVEC:


- (1) matters related to the documents requested by this subpoena; and
- (2) matters contained in the London Economics International, LLC Audit Reports filed in this case on December 17, 2021.

OVEC shall deliver to OCC's office by September 15, 2023, documents containing the following information, all pertaining to the audit of Legacy Generation Rider expenses charged to consumers during calendar year 2020 ("the audit period"), which are under review in this case:

- (1) The amounts charged to AEP, Duke and DP&L during the audit period by OVEC for their share of non-energy costs, including debt service and a return on equity;
- (2) The policies and procedures used by OVEC employees to commit the plants into the PJM Day-Ahead Energy Market during the audit period;
- (3) The policies and procedures in place during the audit period related to operating the plants when OVEC's costs exceed market prices;
- (4) All economic analyses used to decide the unit commitment and dispatch decisions during the audit period for each OVEC unit (i.e., decisions regarding whether to self-schedule a generator in the day-ahead energy market or take them off-line for economic reasons), including all economic analyses to support the \$0 bids into the PJM capacity market;
- (5) The fuel supply contracts for the OVEC units in effect during all or part of the audit period;
- (6) All reports pertaining to instances in the audit period when the coal plants were taken offline;
- (7) All reports on the costs and benefits of switching any of the OVEC units to seasonal operation issued during the audit period;
- (8) All reports on the OVEC fuel cost policies that the coal plants operated under during the audit period;
- (9) All documents containing any requests or recommendations to change the Day-Ahead commitment policies or practices during the audit period; and
- (10) Copies of all minutes of the OVEC Operating Committee and Board of Directors meetings and conference calls held during the audit period.

The documents and deposition relate to the proceeding entitled *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.

Dated at Columbus, Ohio, this 21<sup>st</sup> day of August 2023.

  
\_\_\_\_\_  
PUCO Attorney Examiner

NOTICE: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

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the Dayton Power and Light Company,	)	
and AEP Ohio.	)	

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**RETURN OF SERVICE**

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State of Ohio	)	
	)	ss.
County of Franklin	)	

\_\_\_\_\_, being duly sworn, states that he/she is over eighteen (18) years of age, and that on \_\_\_\_\_, 2023, at approximately \_\_\_\_\_ p.m., he/she served the within subpoena on \_\_\_\_\_ by delivering a copy thereof to \_\_\_\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 2023.

\_\_\_\_\_  
Notary Public



**This foregoing document was electronically filed with the Public Utilities  
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**in**

**Case No(s). 21-0477-EL-RDR**

Summary: Subpoena Motion for Subpoena Duces Tecum for Ohio Valley Electric Corporation to Designate a Witness(es) for Deposition upon Oral Examination and Produce Documents and Request for Expedited Ruling by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Finnigan, John.