

to determine whether the utility's actions were in the best interest of retail ratepayers.³

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.⁴

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 analyze whether the costs charged to consumers were prudent and the utility's actions were in the best interest of retail ratepayers.

To protect consumers, OCC moves the PUCO to issue a subpoena *duces tecum* to OVEC. Under the subpoena, OVEC would be required to designate one or more of its officers, agents, employees, or other duly authorized persons to testify at the upcoming evidentiary hearing on September 26, 2023 at 10:00 a.m. in Hearing Room 11-A and to bring relevant documents listed in the subpoena. OVEC's designee(s) shall be cross-examined on matters known or reasonably available to OVEC, as described in OCC's Memorandum in Support. The proposed subpoena is attached.

³ Entry (March 11, 2020).

⁴ Audit Report (October 7, 2020).

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ John Finnigan

William J. Michael (0070921)
Counsel of Record
John Finnigan (0018689)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700
Columbus, Ohio 43215

Telephone [Michael]: (614) 466-1291

Telephone [Finnigan]: (614) 466-9585

william.michael@occ.ohio.gov

john.finnigan@occ.ohio.gov

(willing to accept service by e-mail)

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. LAW AND ARGUMENT	3
A. Under O.A.C. 4901-1-25, OCC is entitled to seek a subpoena <i>duces tecum</i> to command a designated representative(s) of OVEC to produce documents, attend and give testimony at the evidentiary hearing.	3
B. OCC should be allowed to question OVEC’s witness using leading questions, as on cross-examination, because OVEC is “identified with an adverse party,” per Ohio Evid.R. 611(C).....	5
III. CONCLUSION.....	7

On November 9, 2021, OCC filed a motion for subpoena duces tecum in this case and related cases requesting an OVEC representative to produce documents and testify at a deposition.⁷ DP&L filed a motion to quash on November 19, 2021.⁸ DP&L, AEP and Duke Energy filed a joint motion to quash on December 1, 2021.⁹ OVEC filed a motion to quash on December 13, 2021.¹⁰

In the present case, the Attorney Examiner issued an Entry on April 14, 2023 denying the motions to quash for mootness.¹¹ At that time the Attorney Examiner advised the parties that OCC would need to issue a new motion for subpoena to obtain a subpoena of OVEC.¹²

OCC filed a new Motion for Subpoena of OVEC on June 28, 2023, requesting that OVEC produce documents and designate a witness to appear at a discovery deposition.¹³ OVEC produced the documents requested and produced a witness, who was deposed on July 28, 2023.

⁷ Motion for Subpoena Duces Tecum (November 9, 2021).

⁸ Motion to Quash (November 19, 2021).

⁹ Motion to Quash (December 1, 2021).

¹⁰ Motion to Quash (December 13, 2021).

¹¹ Entry (April 14, 2023).

¹² Transcript of Pre-Hearing Conference of May 18, 2023 at 11 (May 25, 2023).

¹³ Motion for Subpoena Duces Tecum (June 28, 2023).

The Attorney Examiner’s August 2, 2023 Entry scheduled an evidentiary hearing for September 26, 2023. OCC now seeks a subpoena duces tecum to compel OVEC to produce documents and a witness for the evidentiary hearing.

II. LAW AND ARGUMENT

A. 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 the evidentiary hearing.

When initially allowing the utilities to collect OVEC costs, the PUCO required periodic reviews where OVEC’s costs would be subject to “rigorous review”¹⁴ to determine whether OVEC and the utilities acted “in the best interest of retail ratepayers” and acting according to the same standards as a competitive merchant operator regarding how the plants are committed into the PJM market.¹⁵ 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. Moreover, this information is essential to determine “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.”¹⁶

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

¹⁵ *Id.* (Opinion & Order at 89) (March 31, 2016).

¹⁶ Entry, Attachment at 4 (January 29, 2020).

OVEC is a public utility subject to the PUCO's jurisdiction.¹⁷ 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.¹⁸ 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.¹⁹ The PUCO should also allow OCC to subpoena OVEC to the evidentiary hearing in this case..

OVEC employees made the daily unit commitment submissions 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, instead of being forced to rely on an auditors' account or DP&L's account of what the OVEC employees did.

OCC therefore seeks a subpoena from a designated representative(s) of OVEC to produce documents and testify at the evidentiary hearing on various topics relating to

¹⁷ 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).

¹⁸ 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).

¹⁹ *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 (December 21, 2021).

“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.”²⁰

B. OCC should be allowed to question OVEC’s witness using leading questions, as on cross-examination, because OVEC is “identified with an adverse party,” per Ohio Evid.R. 611(C).

As noted above, OCC seeks a designated representative(s) from OVEC to produce documents and testify at the evidentiary hearing on various topics relating to “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.”²¹ Further, OCC seeks to be authorized to treat the designated representative(s) as “identified with an adverse party” and be able to question the witness via leading questions as on cross-examination.

Per Rule 611(C) of the Ohio Rules of Evidence, “when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”²²

The witness OVEC produces should be regarded as “identified with an adverse party” under Evid.R. 611(C). OVEC and its subsidiaries, were “formed by investor-owned utilities furnishing electric service in the Ohio River Valley area and their parent holding companies...”²³ DP&L owns 4.90% equity in OVEC. DP&L is a signatory to an Amended and Restated Inter-Company Power Agreement, the document which governs

²⁰ Entry, Attachment at 4 (January 29, 2020).

²¹ Entry (January 29, 2020).

²² Evid.R. 611(C).

²³ Ohio Valley Electric Corporation Annual Report – 2021 at 1.

how OVEC operates and entitles DP&L to a 4.9% share of the output from OVEC's plants. On October 20, 2017 the PUCO issued an Opinion and Order approving ESP III authorizing Dayton Power and Light to recover or credit the net proceeds of selling OVEC energy and capacity into the PJM Interconnection, LLC (PJM) marketplace and OVEC costs through a reconciliation rider.²⁴ This reconciliation rider went into effect on November 1, 2017 and allows Dayton Power and Light to collect the net proceeds from selling OVEC's energy and capacity into the PJM market. With how interconnected Dayton Power and Light and OVEC are, the representative(s) from OVEC should be treated as though they identify with a hostile or adverse party.

Whether to allow or refuse leading questions when examining a witness is subject to the discretion of the tribunal.²⁵ Ohio courts have held that when the witness has a "strong affinity to the defendant," the witness should be found to be identified with an adverse party.²⁶ Ohio courts have defined an adverse witness as a witness aligned with an opposing party because of a relationship or common interest in the litigation."²⁷

The Federal Rules of Evidence contain the same language as Evid.R. 611.²⁸ Federal court defines "identified with an adverse party" as "in general, an employee, agent, friend, or relative of an adverse party."²⁹ In this case, a close relationship exists

²⁴ *In the Matter of the Application of The Dayton Power and Light for Approval of its Electric Security Plan*, Case No. 16-395-EL-SSO, Second Finding and Order (October 20, 2017).

²⁵ *State v. Wallen*, 21 Ohio App.2d 27, 36, 254 N.E.2d 716 (5th Dist. 1969).

²⁶ *State v. McBeth*, 3rd Dist. Seneca No. 13-18-19, 2019 Ohio App.LEXIS 64 *27 (January 14, 2019) citing *State v. Stearns*, 7 Ohio App.2d 11, 454 N.E.2d 139 (9th Dist. 1982), *see also State v. Warren*, 67 Ohio St. 3d 789, 796, 588 N.E.2d 905 (6th Dist.); *State v. Rutkowski*, 9th Dist. Lorain No., 1995 Ohio App. LEXIS 2273, 1995 WL 324085, *2 (May 31, 1995).

²⁷ *State v. Darkenwald*, 8th Dist. Cuyahoga No. 83440, 2004 Ohio App.Lexis 3294, 13 (May 27, 2004).

²⁸ Fed.R.Evid. 611.

²⁹ *Vanemmerik v. Ground Round*, E.D.Pa. No. 97-5923 1998 U.S. Dist. LEXIS 11765.

between OVEC and Dayton Power and Light. As noted above, DP&L is a minority owner of OVEC. DP&L also is a signatory party to the agreement by which OVEC functions, and, as a result, DP&L can influence how OVEC operates. Further, through the ESP III, DP&L can collect the net proceeds from selling OVEC's energy and capacity into the PJM market. These actions between the companies make it so the OVEC witness should be considered to be "identified with an adverse party" (i.e., DP&L).

OCC therefore requests that the PUCO allow OCC to call the OVEC witness as on cross-examination and to ask leading questions.

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."³⁰ OVEC has important unique information which is needed for a full investigation of these issues. For the protection of consumers, OCC respectfully requests the PUCO grant this Motion for the reasons discussed above.

³⁰ Entry, Attachment at 4 (January 29, 2020).

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ John Finnigan

William J. Michael (0070921)
Counsel of Record – 20-165-EL-RDR
John Finnigan (0018689)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone [Michael]: (614) 466-1291

Telephone [Finnigan]: (614) 466-9585

william.michael@occ.ohio.gov

john.finnigan@occ.ohio.gov

(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 21st 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

thomas.lindgren@ohioAGO.gov

Attorney Examiners:

patricia.schabo@puco.ohio.gov

greg.price@puco.ohio.gov

paul@carpenterlipps.com

bojko@carpenterlipps.com

easley@carpenterlipps.com

jsharkey@ficlaw.com

mwatt@ficlaw.com

christopher.hollon@aes.com

STATE OF OHIO
PUBLIC UTILITIES COMMISSION
180 E. EAST BROAD STREET
COLUMBUS OHIO 43266-0573

Michael DeWine
GOVERNOR



PUBLIC UTILITIES COMMISSION OF OHIO
SUBPOENA DUCES TECUM
TO ATTEND EVIDENTIARY HEARING

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 testify on behalf of OCC as an adverse witness as on cross-examination at the evidentiary hearing in this matter on September 26, 2023 at 10:00 a.m. in Hearing Room 11-A at the Public Utilities Commission, 180 E. Broad Street, 11th Floor, Columbus, Ohio 43215.

OVEC's designee(s) shall be subject to cross-examination by OCC, 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

PUCO

2023 AUG 21 PM 12:12

RECEIVED DOCUMENTS DIV

(2) matters contained in the Vantage Energy Consulting, LLC Audit Report filed in this case on October 7, 2020.

OVEC shall deliver to the evidentiary hearing the following documents, all pertaining to the audit of Rider RR expenses charged to consumers that are under review in this case (Nov. 1, 2018 to Dec. 31, 2019, also referred to as “audit period”):

- (1) The amounts charged to DP&L during the audit period by OVEC for DP&L’s 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;
- (10) Copies of all minutes of the OVEC Operating Committee and Board of Directors meetings held during the audit period.
- (11) The informational eDART tags provided by OVEC to PJM, as referenced at page 1 of the OVEC Operating Committee Market-Based Rate Subcommittee

Conference Call Minutes for July 8, 2019.

- (12) Monthly summaries of the net proceeds of selling Ohio Valley Electric Corporation (OVEC) energy and capacity into the PJM Interconnection, LLC (PJM) marketplace and OVEC costs during the audit period.

The documents and evidentiary hearing relate to the proceeding entitled “In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company, Case No. 20-165-EL-RDR.”

Dated at Columbus, Ohio, this 21st day of ~~September~~^{August} 2023.



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.

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

8/21/2023 1:38:44 PM

in

Case No(s). 20-0165-EL-RDR

Summary: Motion Motion for Subpoena Duces Tecum for Ohio Valley Electric Corporation to Designate a Witness(es) to Attend and Testify at the Evidentiary Hearing by Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Finnigan, John.