BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Reconciliation Rider of The Dayton Power and Light Company	:	Case No. 20-165-EL-RDR

REPLY BRIEF OF AES OHIO

(PUBLIC VERSION)

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I. INTRODUCTION AND SUMMARY

The evidence in this case – including testimony by the third-party auditor engaged by the Commission, OVEC's Chief Operative Officer and Chief Financial Officer Justin Cooper, and AES Ohio's representative on OVEC's Operating Committee David Crusey – establishes the prudency of all costs and sales flowing through the AES Ohio's Reconciliation Rider and that AES Ohio's actions were in the best interest of customers. Significantly, each of those persons has extensive experience regarding the management or operation of coal-fired generation plants. Tr. 19 (Boismenu); Cooper Trans., p. 9; AES Ohio Ex. 1, pp. 1-2 (Crusey).

In their post-hearing briefs, the intervenors second-guess OVEC's operational decisions and argue that OVEC has not been operated prudently. However, the witnesses for the intervenors have no experience managing or operating a coal-fired plant. Tr. 270-71 (Glick); Tr. 333 (Seryak). The Commission should not conclude that the OVEC units were operated imprudently based upon speculative testimony from persons who have no experience operating or managing coal plants.

As AES Ohio demonstrated in its initial brief, and as further demonstrated below, the Commission should reject the arguments made by the intervenors for the following reasons:

1. In its Audit of Duke Energy Ohio, this Commission recently held that OVEC's and Duke Energy Ohio's conduct during 2019 was prudent. The intervenors are collaterally estopped from challenging that ruling in AES Ohio's case.
2. The evidence at the hearing shows that OVEC's and AES Ohio's conduct was prudent. In particular:

a. The Audit did not find any imprudent conduct by AES Ohio or OVEC.

b. The evidence shows that OVEC's fuel costs were reasonable.

c. The evidence shows that offering OVEC's units into PJM's day-ahead energy markets as Must-Run was both: (i) required by the applicable contractual documents; and (ii) reasonable and prudent, in any event.

d. OCC has no evidence to support its argument regarding OVEC debt payments.

3. The Reconciliation Rider has acted as a hedge.

4. AES Ohio has only a 4.9% interest in OVEC, and thus cannot control its actions.

The Commission should thus conclude that the actions of AES Ohio and OVEC were prudent during the Audit Period and should not order any refunds in this case.

II. THE INTERVENORS' ARGUMENTS ARE BARRED BY COLLATERAL ESTOPPEL

The Commission recently concluded that Duke Energy Ohio's ("Duke") OVEC expenses and revenues were prudent for 2019. *In re Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order (Sept. 6, 2023), ¶¶ 55-68. The audit period here is substantially

identical,[1] but the intervenors made no effort in their post-hearing briefs to attempt to distinguish that Commission decision.

In fact, at the hearing, witnesses for the intervenors admitted that they did not have any criticisms of AES Ohio's conduct that were different from their criticisms of Duke's conduct. Tr. 272-73 (Glick) ("If you are asking whether I think that there's a distinction or a difference between what Duke did versus what AES did, I don't have criticisms for AES that are, I guess, different or necessarily unique to AES for this specific audit period."); Tr. 334-35 (Seryak) ("Q. But as you sit here, you have not [compared AES Ohio's conduct to Duke's conduct], and you are not sponsoring any testimony regarding that difference. A. Correct. It did not impact my recommendations.").

The issues relating to PJM revenues and OVEC's costs in this case and in Duke's case are thus identical. They deal with the operation of the same plants, the same costs and the sale of the same energy, capacity and ancillary services into the same PJM markets during the same time period. The only difference between that case and this case is that Duke owns a larger share of OVEC than does AES Ohio.

As AES Ohio demonstrated in its initial brief (pp. 6-9), the Commission's decision in the Duke case collaterally estopps the intervenors from asserting that AES Ohio's conduct was not prudent in this case. *Lowe's Home Ctr., Inc. v. Washington Cty. Bd. of Revision*, 154 Ohio St.3d 463, 2018-Ohio-1974, 116 N.E.3d 79, ¶ 36 ("a party precluded by collateral

[1] AES Ohio's audit period includes November and December 2018, and all of 2019. November and December of 2018 were not included in the recent Duke Audit. Witnesses for OCC and OMAEG could not identify any difference between how OVEC was operated in those two months as compared to how it was operated in 2019. Tr. 273-74 (Glick); Tr. 336 (Seryak).

estoppel from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked a full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue") (internal quotation and citation omitted; emphasis added); *Hoover v. Transcontinental Ins. Co.*, 2d Dist. Greene No. 2003-CA-46, 2004-Ohio-72, ¶ 16 ("only [] the party against whom collateral estoppel is sought must have been a party, or in privity with a party, to the prior action"); *Rhinebolt v. Rhinebolt*, 5th Dist. Delaware No. 09CAF03-0032, 2009-Ohio-5646, ¶ 15 (citing *Thompson v. Wing*, 70 Ohio St.3d 176, 637 N.E.2d 917 (1994)) ("For collateral estoppel purposes, the party against whom res judicata is asserted must have been a party to the prior judgment, not the party asserting res judicata").

III. OVEC'S AND AES OHIO'S CONDUCT WAS REASONABLE AND PRUDENT

A. The Audit Establishes That OVEC's Conduct Was Prudent

After an extensive review, the Auditor concluded that AES Ohio "was in compliance with the [Reconciliation Rider] requirements" and did not identify any actions by either AES Ohio or OVEC that were imprudent or unreasonable. Staff Ex. 2C, pp. 1-54. The Audit included detailed findings that OVEC's and AES Ohio's conduct was prudent. Staff Ex. 2C, pp. 7, 9, 12, 18, 27, 29, 31, 39.

As demonstrated below, the Commission should reject the arguments by the intervenors regarding the Audit.

1. AES Ohio Provided the Information Requested by the Auditor

OMAEG/Kroger (pp. 4, 8-9, 10-16, 22) assert that the Auditor did not evaluate OVEC's fuel costs or the decision to offer OVEC's units as Must-Run into PJM's day-ahead

energy markets because AES Ohio asserted in response to an Auditor data request that those items were "out of scope." OMAEG/Kroger repeatedly (pp. 4, 8-9, 10, 16-22) criticize AES Ohio for allegedly failing to provide requested data to the Auditor.

However, the evidence at the hearing showed that AES Ohio in fact provided the information requested by the Auditor regarding fuel cost and the Must-Run designation.

Specifically, the testimony of AES Ohio witness Crusey explains that AES Ohio provided OVEC's fuel cost history on a $/MMBtu basis in response to Data Request 19 from the Auditor. AES Ohio Ex. 1, p. 14. (The best way to compare fuel costs is on a $/MMBtu basis, since doing so allows for an apples-to-apples comparison. Tr. 209 (Crusey).)

Exhibit 8 to Mr. Crusey's testimony was AES Ohio's response to Auditor Data Request No. 20, and it shows that OVEC's fuel costs were as follows:

AES Ohio Ex. 1, Ex. 8.

AES Ohio thus responded to the Auditor's data request regarding fuel costs.

Mr. Crusey's testimony also includes an exhibit that shows that AES Ohio responded to the Auditor's data request regarding the Must-Run designation:

"**DATA REQUEST**

VEC 20 Confirm whether OVEC is offering the plants into PJM as "must-run".

RESPONSE

DP&L objects to this request as beyond the scope of the audit which is to examine costs and credits as received by DP&L either from OVEC or from PJM markets and ensure they are properly recorded for recovered through the Reconciliation Rider. This audit is not an audit of OVEC, its management or policies, all of which are beyond the control of DP&L as a 4.9% shareholder. Without waiving these objections, DP&L response is as provided by OVEC.

Units are offered into the PJM market consistent with the sponsor approving Operating Committee procedures. With one exception, units that are in service and expected to be available in the day-ahead market are offered as "must run". During Ozone Season Unit 6 at Clifty Creek is assigned an opportunity cost associated with its NOx emissions profile and is offered as Economic."

AES Ohio Ex. 1, Ex. 4 (emphasis added).

The fact that AES Ohio's response to the Auditor's data request included an objection is not unusual in Commission proceedings. As demonstrated in AES Ohio's initial brief (pp. 22-23) and as further demonstrated below, that objection -- that AES Ohio does not control OVEC -- is sound. But, again, the critical point is that AES Ohio provided the information that the Auditor requested.

Significantly, despite the many pages of their brief dedicated to this issue, OMAEG/Kroger did not identify a single data request from the Auditor that AES Ohio failed to respond to appropriately.

It is also significant that the Auditor testified that OVEC "was prudent in its process of fuel procurement." Tr. 66. In addition, as demonstrated in AES Ohio's initial brief

(pp. 11-14), and as further demonstrated below, the evidence offered by AES Ohio establishes that OVEC's fuel procurement policies were prudent.

In addition, as demonstrated in AES Ohio's initial brief (pp. 14-19) and as further demonstrated below, the evidence at the hearing established that using a Must-Run designation was reasonable and prudent.

Finally, if the Commission were to conclude that the Audit was inadequate regarding fuel costs or the Must-Run designation, and that the inadequacy precludes the Commission from concluding that those items were prudent, then the Commission should order the Auditor to rectify any inadequacy in its Audit. AES Ohio responded to the Auditor's data requests and should not be penalized if the Commission were to conclude that the Auditor failed to complete its assigned tasks.

2. Acting Prudently is in the Best Interests of Customers

OMAEG/Kroger (pp. 20, 26-29) criticize the Auditor because (according to them), the Auditor failed to consider whether OVEC was operating in the best interests of customers. However, as the Auditor explained, acting prudently was in the best interests of customers:

> "Q. But the audit report does not to your knowledge consider or reference the best interests of retail ratepayers in the rest of the analysis of the report, does it?
>
> A. I disagree.
>
> Q. Where are the words "in the best interests of customers" located in the audit report?
>
> A. I think by inference we found that the company was prudent in the processes that were used with the RR program.

> Q. But isn't it true that the audit report does not specifically use and conclude what's in the best interests of customers?
>
> A. I think it's -- it's inferred because the audit report found that the company was prudent in its process that it would be in the best interests of the consumers."

Tr. 62-63.

B. OVEC's Fuel Costs Were Prudent

In its recent decision regarding Duke's 2019 OVEC costs, the Commission held that "Duke/OVEC's coal procurement practices were prudent." *In re Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order (Sept. 6, 2023), ¶ 61. None of the intervenors attempted to distinguish that decision, even though it covered the 2019 period, which is also at issue here.

In addition, as demonstrated in AES Ohio's initial brief (pp. 11-14), the evidence in this case also shows the prudence of those fuel costs. Cooper Trans., pp. 63, 69; AES Ohio, Ex. 1C, pp. 12-15 (Crusey).

OMAEG/Kroger (pp. 19-20) assert that OVEC's fuel costs were not prudent because OVEC acquires coal from the same mine from different suppliers at different prices. The Commission should reject that argument because OMAEG witness Seryak admitted that the two contracts were signed at different times. Tr. 364. Mr. Seryak did not compare the price in those contracts to published market prices as of the time those contracts were signed. Tr. 363. His testimony thus does not establish that the price in one of the contracts was above the applicable market price when it was signed.

C. OVEC's Must-Run Designation Was Prudent

1. The ICPA and the Operating Procedures Require That the Units be Offered as Must-Run

As demonstrated in AES Ohio's initial brief (pp. 15-16), the ICPA and the Operating Procedures require that OVEC offer its units as Must-Run in PJM's day-ahead energy markets.

In their testimony and in their briefs, the intervenors did not contest AES Ohio's decision to sign to ICPA or its vote to approve the Operating Procedures. Tr. 278-79 (Glick); Tr. 337 (Seryak). Nor do they explain how OVEC could designate those units as Economic when those documents require that they be designated as Must-Run.

2. OVEC's Decision to Offer the Units as Must-Run was Prudent

In Duke's case, the Commission found that offering the OVEC units as Must-Run was prudent. *In re Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order (Sept. 6, 2023), ¶ 58. The intervenors made no attempt to distinguish that decision.

In addition, as demonstrated in AES Ohio's initial brief (pp. 16-19), it was prudent for OVEC to offer the units as Must-Run, even if it was not contractually required. AES Ohio Ex. 1, pp. 9-10; Cooper Trans., pp. 22-23, 67-68.

OCC (pp. 4-8) and OMAEG/Kroger (pp. 21-26) assert that it was imprudent to designate the units as Must-Run because doing so resulted in losses during the Audit Period. They further assert that the units should have been designated as Economic, and shut down for periods of time. The Commission should reject that argument for the following separate and independent reasons:

1. As established above, the ICPA and the Operating Procedures mandated the use of the Must-Run designation.

2. While shutting down the OVEC plants would save fuel and variable costs, doing so would also eliminate the resulting PJM revenue for energy, capacity and ancillary services. Further, AES Ohio would still have to pay OVEC's fixed costs associated with the OVEC Demand Charge. AES Ohio Ex. 1, Ex. 1, ¶ 5.03. There is no evidence that shutting down the OVEC plants would result in net savings.

   Further, witnesses for the intervenors admitted that owners of coal-fired plants tend to designate them as Must-Run because the plants have large start-up costs and cycling the plants creates risks of damaging the plants. Tr. 289 (Glick) ("I think coal-fired plants tend to be committed as must run because they have long start-up times, long shut-down times. It's expensive."); Tr. 353-54 (Seryak). *Accord*: AES Ohio Ex. 1, pp. 9-10 (Crusey) ("As an example, it may be cheaper to keep OVEC units online during a weekend even though prices are generally lower and OVEC may appear to be selling at a loss, because the expense to restart units Monday morning is greater than the loss that would be realized by keeping the units on over the weekend. . . . Based upon my experience working on the Operating Committee, it is my understanding that it is more economical and prudent to keep these units on even if the economics may appear to be unattractive for short periods of time.").

3. A prudence determination must be made based upon information that was known at the time a decision was made. The intervenors' conclusion that OVEC's costs exceeded market rates for select periods of time is based upon information known now. However, it is undisputed that coal plants are not designed to be turned on and off repeatedly for short periods of time. Tr. 289 (Glick); Tr. 353-54 (Seryak). While OVEC should know its costs to operate when it starts its units, it could not know what future energy prices would be, and the intervenors have not shown that the decision to designate the units as Must-Run was imprudent at the time.

OMAEG/Kroger (pp. 22-27) criticize AES Ohio because AES Ohio did not conduct an independent economic analysis of whether OVEC's units should be offered as Must-Run or Economic. The Commission should reject that argument for three reasons.

1. As demonstrated above, the ICPA and the Operating Procedures mandate the use of the Must-Run designation.
2. As OMAEG/Kroger concede (p. 23), unlike AES Ohio, Duke continues to own and operate generation plants, and analyzes OVEC's projected costs and revenues while it is analyzing its own plants. Tr. 304-05 (Glick); OCC Ex. 3C, p. 38 (Glick). The evidence at the hearing shows that Duke's customers and AES Ohio's customers were treated the same as to the calculation of OVEC's costs and revenues. Tr. 312 (Glick). Further, when generation prices were extremely low during COVID, and it became financially sound to offer OVEC units as Economic instead of Must-Run, Duke approached OVEC and the co-owners, who agreed to offer the units

as Economic while generation prices were very low. AES Ohio Ex. 1C, p. 10 (Crusey); Tr. 101-02 (Crusey).

OCC (pp. 8-11) asserts that data from MISO shows that coal-fired merchant plants in MISO rarely have unprofitable starts when offered as Must-Run, and OCC argues that OVEC should be operated like one of those merchant plants in MISO. The Commission should reject that argument for the following reasons.

1. There is no evidence that the merchant plants in MISO have contractual requirements to be operated as Must-Run, like the requirements in the ICPA and Operating Procedures.
2. The data is from MISO, and OCC has no evidence that it is applicable to coal-fired plants in PJM.
3. OCC cites to data regarding merchant plants, but as it admits (p. 1), OVEC's Sponsor Companies include utilities in other states and cooperatives. OCC does not cite to any evidence establishing that OVEC should be operated like a merchant plant in the MISO market.

D. The Commission Should Reject OCC's Argument Regarding Debt Reserve

OCC (pp. 13-14) argues that the Commission should conclude that AES Ohio paid $1,470,000 of costs associated with "advance billing of debt reserve" and that the Commission should conclude that that amount is not recoverable through the Reconciliation Rider. The Commission should reject that argument for the following reasons.

First, OCC has no evidence to support that argument. The document to which OCC cites (p. 13, n. 62) was not offered or admitted as an exhibit in this case. And even if the

Commission were to consider that document, OCC has no evidence regarding what that line item represents.

Second, in any event, the ICPA permits OVEC to charge the Sponsoring Companies "the applicable amount of the debt amortization component for such month to retire the total amount of indebtedness of the Corporation issued and outstanding." AES Ohio Ex. 1, Ex. 1, ¶ 5.03(a)(p. 9). The ICPA thus authorizes prepayments of debts.

IV. THE RECONCILIATION RIDER HAS ACTED AS A HEDGE

As demonstrated in AES Ohio's initial brief (pp. 5-6), the Supreme Court of Ohio has held that a charge for AEP Ohio that collected or credited net OVEC costs/revenues to customers was a lawful "hedge." *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement*, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶¶ 3-4, 59. The Commission later approved the Reconciliation Rider for AES Ohio to charge or credit customers for OVEC's net costs/revenues as a "hedge." *In the Matter of the Application of AES Ohio*, Case No. 16-395-EL-SSO, *et al*., Opinion and Order (Oct. 20, 2017), ¶ 63.

OMAEG/Kroger (pp. 2-3, 16-17) assert that the Reconciliation Rider has not acted as a hedge, because (p. 17) "the RR resulted in a charge to customers every month during the audit period." The Commission should reject that argument for the following reasons:

First, the evidence showed that the Reconciliation Rider would be a charge or credit to customers, based upon the net difference between OVEC's costs and the revenues received by AES Ohio for selling OVEC's energy, capacity and ancillary services into the PJM markets. Staff Ex. 2C, pp. 7-31 (Vantage Audit); AES Ohio Ex. 1C, p. 2 (Crusey); AES Ohio

Ex. 2, pp. 2-3 (Donlon). Indeed, OCC witness Glick and OMAEG witness Seryak both admitted that the Reconciliation Rider could be a charge or credit based upon the difference between OVEC's costs and PJM's revenues. Tr. 281 (Glick); Tr. 344-45 (Seryak). The Reconciliation Rider is thus acting as a hedge.

Second, when the Commission approved the Reconciliation Rider, it knew that the Rider would pass on to customers the net difference between PJM revenues and the OVEC costs. *In the Matter of the Application of AES Ohio*, Case No. 16-395-EL-SSO, *et al*., Opinion and Order (Oct. 20, 2017), ¶ 63. The Commission was thus well aware of the fact that the Reconciliation Rider could be a credit or a charge.

Third, in November of 2018, the PJM revenues did exceed OVEC costs. Staff Ex. 3; Tr. 123-24 (Crusey). In addition, during 2022, market prices were above OVEC's costs, and the total PJM revenues associated with OVEC exceeded the total OVEC costs, resulting in credits to customers. Tr. 136 (Crusey). That evidence establishes that the Reconciliation Rider has and is in fact operating as "a hedge which will mitigate spikes in market prices." *In the Matter of the Application of AES Ohio*, Case No. 16-395-EL-SSO, *et al*., Opinion and Order (Oct. 20, 2017), ¶ 63.

OCC (p. 5) and OMAEG/Kroger (pp. 18-19) cite to witness Seryak's testimony for the proposition that AES Ohio collected $9 million more through the Reconciliation Rider than AES Ohio projected that it could recover when it sought approval of the Reconciliation Rider, and that amount should be refunded. The Commission should reject that argument for two reasons.

First, the Commission did not impose a requirement that collections under the Reconciliation Rider match AES Ohio's projections of future revenues and costs. *In the Matter of the Application of AES Ohio*, Case No. 16-395-EL-SSO, *et al*., Opinion and Order (Oct. 20, 2017), ¶ 63. Indeed, the Commission expressly rejected the same argument in its recent decision regarding the prudence of Duke's 2019 OVEC costs. *In re Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Opinion and Order (Sept. 6, 2023), ¶ 60 ("The Commission also finds that OMAEG/Kroger's argument that any dollar amount over the originally predicted cost of $18 million should be disallowed to be unpersuasive. There was no language in the original order that explicitly tied recovery to the predicted amount. Instead, the recovery amounts would be subject to annual prudency reviews, which brought forth this proceeding and the audit.")

Second, as demonstrated in AES Ohio's initial brief (pp. 21-22), witness Seryak used the wrong projections to perform his analysis. OCC witness Glick also compared AES Ohio's projections to actual costs that AES Ohio recovered through the Reconciliation Rider, but she used the right projections, and concluded that the actual amounts AES Ohio collected through the Reconciliation Rider were "very close" to AES Ohio's projections. OCC Ex. 3C, p. 24; Tr. 285-86.

V. AES OHIO HAS ONLY A 4.9% INTEREST IN OVEC

As AES Ohio demonstrated in its initial brief (pp. 22-23), it has only a 4.9% interest in OVEC and cannot unilaterally control OVEC's actions. Therefore, even if the Commission were to conclude that OVEC's actions were in some way imprudent, the Commission should not conclude that AES Ohio acted in an imprudent manner, since AES Ohio cannot unilaterally control OVEC's actions.

OCC (pp. 11-13) asserts that the Commission has held in two cases that minority owners are responsible for the actions of plant operators. However, in the cases that OCC cites, the minority owner never asserted that it did not have control and the Commission thus did not decide whether a party could be held to have acted imprudently when it had no ability to control the actions of the majority.

Here, again, the witnesses for the intervenors do not contest AES Ohio's decision to sign the ICPA. Tr. 278-79 (Glick); Tr. 337 (Seryak). Therefore, even if the Commission were to conclude that OVEC acted imprudently (it did not), the Commission should conclude that AES Ohio did not have the ability to control OVEC and that AES Ohio thus did not act imprudently.

VI. CONCLUSION

The Commission should conclude that AES Ohio and OVEC acted prudently during the Audit Period.

Respectfully submitted,

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