**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**REPLY COMMENTS**

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#

# I. INTRODUCTION

Ohio consumers could be made to pay about $1.3 billion in coal power plant subsidy charges for the 16-year period ending in 2030, as a result of PUCO and tainted House Bill 6-sponsored subsidies.[[1]](#footnote-2) Consumers have paid and are paying the coal plant subsidy charges to AEP, AES and Duke for two Ohio Valley Electric Corporation (“OVEC”) coal plants (one in Indiana).

In this case, the Public Utilities Commission of Ohio (“PUCO”) is reviewing whether the coal plant subsidies (as charged to consumers) were prudently incurred during 2020.[[2]](#footnote-3) Prudent is not a word that attaches to charges to Ohioans for these coal plants.

Former PUCO Chairman Asim Haque stated that “This [approval of a mechanism to collect OVEC costs] should not be perceived as a blank check, and consumers should not be treated like a trust account.”[[3]](#footnote-4) Unfortunately, AEP, AES and Duke are doing exactly what Chair Haque warned against when the PUCO allowed the subsidy charges at consumer expense.

 In 2021, the PUCO engaged London Economics International LLC (“LEI”) as an independent auditor to assist with the prudency and reasonableness audit. The PUCO-hired auditor filed a separate audit report for AES, AEP and Duke in December 2021. The purpose of the audit was to “to establish the prudency of all the costs and sales flowing through the LGR Rider, and to investigate whether [AES, AEP and Duke’s] actions were in the best interest of its retail consumers.”[[4]](#footnote-5)

 In its Initial Comments, OCC recommended that the PUCO require the PUCO-hired auditor to perform an hour-by-hour dispatch analysis and disallow any above-market costs paid by AEP, AES and Duke during prolonged periods of low-market prices:

* Disallow the $12.6 million for buying coal at above-market prices;
* Disallow any costs related to the Clifty Creek plant which were incurred after the U.S. EPA’s proposed decision to deny any extensions for coal ash pond permits at the plant; and
* Disallow any costs for decommissioning the plants in the future.[[5]](#footnote-6)

# II. ARGUMENT

## The PUCO should require the PUCO-hired auditor to calculate the return on equity (profit) charges paid by AEP, AES and Duke and order that this amount be credited back to consumers because the return on equity payments were imposed in violation of R.C. 4928.01(A)(42) and were imprudent.

LEI reported that the Ohio utilities are asking consumers to pay for their share of the coal power plant costs and also are seeking to charge consumers for a return on investment (profits). LEI states in the audit that “one component of fixed costs, referred to as ‘Component (D)’ in the OVEC bill, is identified by the ICPA [Amended and Restated Inter-Company Power Agreement] as a payment per common share (similar to a dividend).”[[6]](#footnote-7)

But OVEC’s capital expenditures are not part of a rate base for which they are allowed a regulated rate of return to charge to consumers. Component D is itself a return to the owners of OVEC.[[7]](#footnote-8) The audit further states that “the Commission may wish to examine this” because “ORC 4928.01(A)(2) requires that "Prudently incurred costs …must exclude any return on investment in common equity…”[[8]](#footnote-9) The PUCO should order the PUCO-hired auditor to calculate the charges attributable to a return on equity and require AEP, AES and Duke to credit the charges back to consumers.

AEP and Duke argue “the prudence or reasonableness of the ICPA is not part of this audit”[[9]](#footnote-10) and thus outside the scope of review.[[10]](#footnote-11) Duke argues that prudence of ICPA costs “should be determined based on what was known at the time the decision to incur these costs was made”[[11]](#footnote-12) and that the decisions were made decades ago when the plants were vitally important to the nation.[[12]](#footnote-13) Both AEP and Duke also reference approval by the Federal Energy Regulatory Commission (“FERC”) as a factor supporting inclusion of these costs in the coal plant subsidy. The PUCO should not indulge such a utility end-run around the requirement for prudency.

The Citizens Utility Board of Ohio (“CUB”) and the Union of Concerned Scientists (“UCS”) correctly asserted that Component D is a return on equity and thus “is significant as a direct violation of the definition of prudent costs recoverable under the LGR.”[[13]](#footnote-14) Further, R.C. 4928.01(A)(42) specifically requires that the PUCO “shall exclude any return on investment in common equity” associated with the mandated coal power plant subsidy..[[14]](#footnote-15)

The PUCO should order AEP, AES and Duke to credit consumers for these imprudent and unlawful coal plant subsidy charges.

## The PUCO should require AEP, AES and Duke to credit consumers for coal power plant subsidy charges arising from OVEC’s commitment of the plants as “must-run” (to be determined by an hour-by-hour dispatch analysis performed by the PUCO-hired auditor). This operational approach was imprudent and added needless charges to consumers.

As noted in OCC’s Initial Comments, the OVEC units were mostly self-scheduled (also referred to as “must run”). They were scheduled that way regardless of whether it made economic sense to operate at the time (and regardless of whether it made sense for the consumers being charged the subsidy).[[15]](#footnote-16)

Both AEP and Duke explain that the decision to operate as “must run” was made by the OVEC Operating Committee. “The procedure for the dispatch of OVEC’s generating units is determined under formal procedures established by the OC [OVEC Operating Committee], which is a committee formed under the terms of the ICPA to establish procedures for, among other things, the scheduling of the OVEC generating units.”[[16]](#footnote-17)

But the utilities cannot insulate themselves this way from accountability to consumers. This is no excuse for imprudent operation because the PUCO must review the prudency not only of AEP, AES and Duke’s actions but also of OVEC’s actions.[[17]](#footnote-18) OCC agrees with the Ohio Manufacturers’ Association Energy Group (“OMAEG”) that, under R.C. 4928.148, “the Sponsoring Companies cannot recover for imprudent and unreasonable OVEC costs."[[18]](#footnote-19)

The PUCO should reject the suggestion by AEP and Duke that the prudency of OVEC’s actions are not at issue. R.C. 4928.148 requires the PUCO to decide “the prudence and reasonableness of electric distribution utilities with ownership interests in the legacy generation resource.”[[19]](#footnote-20) The statute requires the PUCO to examine the prudency of OVEC’s actions as well as the prudency of the actions of AEP, AES and Duke.

In addition, whether AEP, AES and Duke acted prudently cannot be determined without examining whether OVEC, as the day-to-day plant operator, acted prudently in the first instance in its day-to-day plant operations. Otherwise, any prudency review by the PUCO would be futile. That’s because AEP, AES and Duke could simply take the position (which they are taking here) that no matter how imprudently OVEC operated the plants, AEP, AES and Duke have no responsibility for OVEC’s actions. So, they claim, they cannot be held responsible for any imprudent behavior by OVEC.

The statute’s plain meaning does not allow the limits on review as argued by the utilities. In addition, failing to review the prudency of OVEC’s actions would violate Ohio law regarding statutory construction. A statute must be construed with a view toward the object sought to be attained.[[20]](#footnote-21) Here, the objective of a prudence review is consumer protection, and that objective cannot be attained unless the PUCO examines whether OVEC acted prudently. A statute must also be construed with a view toward the consequences of a particular construction.[[21]](#footnote-22) Here, the consequence of not reviewing the prudency of OVEC’s actions is that consumers would not receive any protection from imprudent operation of the OVEC plants.

AEP and Duke further assert that must-run commitment is beneficial to consumers because the longer start-up times and higher start-up costs of coal-fired generation would lead to higher aggregate costs if the OVEC plants were run strictly using economic commitment. Duke argues that “(w)hen used correctly, for the OVEC units, a “Must-Run” commitment strategy, and one that uses an “Economic” commitment strategy when necessary, will produce greater value for customers than an Economic-only commitment strategy.”[[22]](#footnote-23) AEP employs a similar argument, stating that “OVEC, through its own processes, may identify economic usage by keeping its units online during periods when its variable cost is below market price.”[[23]](#footnote-24)

However, these arguments do not address the prudence of commitment decisions by OVEC, or the increased coal subsidy charged to consumers as attributable to these commitment decisions. The utilities merely make broad and conclusory statements regarding commitment strategy generally.

As asserted in its Initial Comments, “OCC recommends that the PUCO order its auditor to perform an hour-by-hour dispatch analysis for 2020, and require AES, AEP and Duke to credit consumers for the full amount that the coal plant subsidy charge was above market prices.”[[24]](#footnote-25) The PUCO should disallow imprudent and unreasonable above-market coal costs and require AES, AEP and Duke to credit consumers $12.6 million for such above-market coal costs.

AEP and Duke argue that OVEC purchase contracts for coal are reasonable and prudent. “Given the inability of the coal supply chain to swiftly respond to changes in real-time demand, coal contracts with longer term supply, delivery, and inventory planning are necessary and reduce the volatility of fuel inventories and are entered into well in advance of the actual use period.”[[25]](#footnote-26)

However, when the price of coal is declining, these long-term contracts may result in the purchase of coal at above-market prices, and lead to imprudent costs. AEP acknowledges that a review of contracting procedures by OVEC is in order, stating that “AEP Ohio is amenable to bringing these issues to OVEC’s attention to see if other contracting tactics would benefit OVEC’s operation.”[[26]](#footnote-27) But AEP’s approach is not a shield against the prudence under review in this case where consumer protection is an issue.

It is not possible to ascertain the precise source or full extent of OVEC’s imprudency without examining contract terms; however, as explained in OCC’s Initial Comments, OVEC paid $12.6 million in above-market charges for coal supplied to the Clifty Creek unit.[[27]](#footnote-28) Some of these above-market charges were paid to buy coal with the same average heat content and from the same mine being purchased from different companies.[[28]](#footnote-29) Thus, the PUCO auditor concluded that “(t)he evidence in this case suggests that OVEC’s $12.6 million in above-market charges to consumers through the Coal Plant Subsidy Charge in 2020 were **imprudently** incurred and should be disallowed.”[[29]](#footnote-30)

## The lack of a cap on capital expenditures was imprudent and charging consumers for decommissioning costs was also imprudent. All Clifty Creek expenditures since the U.S. EPA denied extensions for the coal ash pond should be disallowed and if already charged to consumers, should be credited back.

LEI determined that “there is no cap on annual capital expenses. This could lead to over investment in the plants, as the Commission does not review and/or approve the OVEC capital expenditures.”[[30]](#footnote-31) Compounding this problem is a lack of oversight AEP stated in its Initial Comments: “AEP Ohio did not seek pre-approval for the capital investments because that is not practical in terms of the operation and maintenance of a power plant and it is not contemplated in the ICPA.”[[31]](#footnote-32)

The Citizens Utility Board and the Union of Concerned Scientists commented that they “recommend a cap on capital costs passed on through the demand charge that is put into the LGR and passed on to Ohio ratepayers. While we do not recommend an actual cap on spending, as we do not feel it appropriate to direct OVEC or the utilities how to spend their money, we do urge a cap on what the Companies can recover from Ohio ratepayers through the rider.”[[32]](#footnote-33)

CUB and UCS extend this recommendation to state that “a cap of $0 is necessitated for those costs that are avoidable through early retirement, including the plants’ significant environmental compliance and fuel procurement costs.”[[33]](#footnote-34) The PUCO should adopt a cap of zero, for such charges to consumers.

 Further, and as recommended in OCC’s Initial Comments, decommissioning costs (including those paid by consumers to fund a reserve for eventual plant decommissioning) should not be collected from consumers through the coal plant subsidy (or anywhere).[[34]](#footnote-35) “It is indeed troubling that AES, AEP and Duke’s contract with OVEC expires in 2040 and, while the units have no set retirement date, they are unlikely to last another 17 years.”[[35]](#footnote-36) The PUCO should cap coal plant subsidy charges to consumers that are avoidable through early retirement at $0, and credit customers for any overpayment into reserves for eventual decommissioning.

## The PUCO should hold an evidentiary hearing.

In addition, and as OCC argued in its pending Interlocutory Appeal,[[36]](#footnote-37) the PUCO should conduct a full evidentiary hearing to determine which subsidized costs are imprudent. The Ohio Environmental Council wrote that “An evidentiary hearing is particularly important in this case given the ongoing public scrutiny of OVEC.”[[37]](#footnote-38) Other commenters also seek a hearing.”[[38]](#footnote-39)

# III. CONCLUSION

 Former PUCO Chairman Asim Haque stated that “This [approval of mechanism to collect OVEC costs] should not be perceived as a blank check, and consumers should not be treated like a trust account.”[[39]](#footnote-40) The PUCO should heed those words in Chair Haque’s concurring opinion, for protecting consumers. And the PUCO should adopt OCC’s recommendations including scheduling an evidentiary hearing for the case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electronic transmission, this 23rd day of May 2023.

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1. OCC Initial Comments at 2 (May 8, 2023). [↑](#footnote-ref-2)
2. Entry (May 5, 2021). [↑](#footnote-ref-3)
3. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p. 5 (March 31, 2016). [↑](#footnote-ref-4)
4. LEI Audit Report at 7 (Dec. 17, 2021). [↑](#footnote-ref-5)
5. OCC Initial Comments (May 8, 2023). [↑](#footnote-ref-6)
6. LEI Audit Report on AEP at 9 (Dec. 17, 2021). [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. *Id.* [↑](#footnote-ref-9)
9. AEP Initial Comments at 2 (May 8, 2023). [↑](#footnote-ref-10)
10. Duke Initial Comments at 4 (May 8, 2023). [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. Joint Initial Comments of the Citizens Utility Board of Ohio and Union of Concerned Scientists at p. 15. [↑](#footnote-ref-14)
14. R.C. 4928.01(A)(42). [↑](#footnote-ref-15)
15. OCC Initial Comments at 5 (May 8, 2023). [↑](#footnote-ref-16)
16. AEP Initial Comments at 3 (May 8, 2023); Duke Initial Comments at 5 (May 8, 2023). [↑](#footnote-ref-17)
17. R.C. 4928.148. [↑](#footnote-ref-18)
18. Ohio Manufacturer’s Association Energy Group Initial Comments at 7 (May 8, 2023). [↑](#footnote-ref-19)
19. R.C. 4928.144(A)(1). [↑](#footnote-ref-20)
20. R.C. 1.49(A). [↑](#footnote-ref-21)
21. R.C. 1.49(E). [↑](#footnote-ref-22)
22. Duke Initial Comments at 8 (May 8, 2023). [↑](#footnote-ref-23)
23. AEP Initial Comments at 4 (May 8, 2023). [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. Duke Initial Comments at 10 (May 8, 2023). [↑](#footnote-ref-26)
26. AEP Initial Comments at 7 (May 8, 2023). [↑](#footnote-ref-27)
27. OCC Initial Comments at 12 (May 8, 2023). [↑](#footnote-ref-28)
28. *Id.* [↑](#footnote-ref-29)
29. *Id.* at 13 (emphasis added). [↑](#footnote-ref-30)
30. LEI Audit Report at 10 (Dec. 17, 2021). [↑](#footnote-ref-31)
31. AEP Initial Comments at 8 (May 8, 2023). [↑](#footnote-ref-32)
32. Joint Initial Comments of the Citizens Utility Board of Ohio and Union of Concerned Scientists at 9 (May 8, 2023). [↑](#footnote-ref-33)
33. *Id.* at 9-10. [↑](#footnote-ref-34)
34. OCC Initial Comments at 14-15 (May 8, 2023). [↑](#footnote-ref-35)
35. *Id.* [↑](#footnote-ref-36)
36. OCC Interlocutory Appeal (April 12, 2023). [↑](#footnote-ref-37)
37. Ohio Environmental Council Initial Comments at p. 4. [↑](#footnote-ref-38)
38. Joint Initial Comments of the Citizens Utility Board of Ohio and Union of Concerned Scientists at p. 16. [↑](#footnote-ref-39)
39. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, PUCO Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at p. 5 (March 31, 2016). [↑](#footnote-ref-40)