**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 |

**INITIAL BRIEF FOR CONSUMER PROTECTION**

**BY**

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[I. The Attorney Examiners erred by excluding evidence relating to an earlier audit of the coal plants where the PUCO Staff asked the London Economics Auditor to retract her opinion that running the plants was *not* “in the best interest of retail ratepayers.” The present case involves the same Auditor, the same PUCO Staff, the same coal plants and the same type of above-market energy costs. The excluded evidence was highly relevant to prove London Economics’ (and PUCO’s) bias, prejudice and lack of independence from utility influence. The Attorney Examiners also erred by prohibiting cross-examination on these issues. 29](#_Toc158641652)

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# INTRODUCTION

This case concerns $105 million in above-market price electricity costs that Duke, Dayton Power & Light, and AEP Ohio charged to Ohioans in 2020 for the imprudent operation of two 1950s-era, dirty, inefficient coal plants known as the OVEC plants. The PUCO should not force Ohio consumers to subsidize the utilities’ imprudent operation of the OVEC plants and pay for above-market energy costs. One of the OVEC plants, Clifty Creek, is located in *Indiana* and does not provide any economic benefits for Ohioans!

Duke, DP&L, and AEP Ohio charge consumers for operating the OVEC plants under the corrupt H.B. 6 coal bailout,[[1]](#footnote-2) which United States District Judge Algenon Marbley called an “*unparalleled corruption* of Ohio’s democratic process.”[[2]](#footnote-3) The H.B. 6 scandal has resulted in the criminal conviction of former Ohio House Speaker Larry Householder, FirstEnergy’s admission that it bribed former PUCO Chair Sam Randazzo, and a federal criminal indictment against Randazzo for bribery and embezzlement.[[3]](#footnote-4) Legislative efforts to repeal the H.B. 6 coal subsidies have stalled despite the criminal convictions, indictments, and public outcry.

While the H.B. 6 coal subsidy remains, consumers should not be further harmed by subsidizing imprudent operations of the OVEC plants. The day-to-day coal plant operations were performed by OVEC and followed written procedures developed by the plant owners – the utilities.[[4]](#footnote-5) One key operating decision was whether to keep the plants running every day (despite incurring $105 million in losses during 2020) or to only run the plants on the few days during the year when they might earn a profit. The PUCO’s Auditor London Economics, charged with examining OVEC’s operation, failed to examine the prudency of these daily operating decisions[[5]](#footnote-6) – even though the PUCO had expressly required it to do so.[[6]](#footnote-7)

The evidence in this case established that the coal plant subsidy costs in 2020 were not prudent, not in the best interests of consumers and not consistent with how a merchant coal plant owner seeking to maximize profits would have operated the plants. The PUCO should therefore disallow the entire $105 million in above-market price coal plant subsidy costs.

# II. BACKGROUND

## The coal plants.

OVEC is jointly-owned by twelve electric utilities and cooperatives in Ohio, Indiana, Michigan, Kentucky, West Virginia, and Virginia.[[7]](#footnote-8) OVEC owns and operates two 1950s-era, coal-fired power plants: (1) Kyger Creek, a five-unit, 1,086 MW plant in Gallia County, Ohio, and (2) Clifty Creek, a six-unit, 1,303 MW plant, in Jefferson County, Indiana.[[8]](#footnote-9) The coal plants were originally built to provide power for the Piketon uranium enrichment facility.[[9]](#footnote-10) The Piketon facility ceased enriching uranium, so OVEC ceased selling power to the Department of Energy for the Piketon plant effective September 30, 2003.[[10]](#footnote-11)

The coal plants currently provide electricity controlled by the twelve OVEC owners in accordance with the terms of the Inter-Company Power Agreement (“Coal Plant Ownership Agreement”).[[11]](#footnote-12) The Coal Plant Ownership Agreement, signed on July 10, 1953 and then amended on August 11, 2011, governs the owners’ rights and duties as to the power produced by the coal plants.[[12]](#footnote-13) OVEC bills the owners for their shares of energy, capacity, and ancillary services under the Coal Plant Ownership Agreement, with each owner’s power sold into the PJM market, and each company receiving the resulting revenues.[[13]](#footnote-14)

AEP Ohio maintains a 19.93% ownership share, is responsible for 19.93% of OVEC’s fixed and variable costs, and is entitled to a 19.93% share of coal plant revenues from the PJM markets.[[14]](#footnote-15) Duke maintains a 9% ownership share, is responsible for 9% of OVEC’s fixed and variable costs, and is entitled to a 9% share of coal plant revenues from the PJM markets.[[15]](#footnote-16) AES maintains a 4.9% ownership share, is responsible for 4.9% of OVEC’s fixed and variable costs, and is entitled to a 4.9% share of coal plant revenues from the PJM markets.[[16]](#footnote-17)

The difference between the coal plant costs versus the market price received from PJM is passed on consumers as either a charge or a credit through the Legacy Generation Rider (“coal plant subsidy charge”) adopted as part of H.B. 6.[[17]](#footnote-18) However, the coal plants are uncompetitive because operating the old inefficient plants costs significantly more than current market prices for electricity.[[18]](#footnote-19) AEP, Duke and DP&L’s continuing operation of the coal plants harms Ohio consumers because the coal plants operate for lengthy periods when they lose money and contribute to air pollution.

## The OVEC Operating Committee and OVEC management.

The OVEC Operating Committee developed a written procedure requiring that the coal plants be committed into the Day-Ahead Energy market as “must-run” at all times.[[19]](#footnote-20) Due to circumstances relating to the Covid pandemic, the OVEC Operating Committee granted OVEC management the right to commit the plants as either “must-run” or “economic” during the period of April 14, 2020 through June 30, 2020.[[20]](#footnote-21) The record contains no evidence as to how often OVEC management used “economic” commitment during this period.

## The H.B. 6 coal bailout.

The H.B. 6 coal bailout created the “Legacy Generation Rider,” which allows AEP, Duke and DP&L to collect coal plant subsidy costs through December 31, 2030.[[21]](#footnote-22) The PUCO must determine “the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource (*i.e.,* the two coal plants), including their decisions related to offering the contractual commitment into the wholesale markets, and the prudence and reasonableness of such actions.”[[22]](#footnote-23)

Revised Code Section 4928.01(A)(42) defines “prudently incurred costs” as:

deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource, less any revenues realized from offering the contractual commitment for the power agreement into the wholesale markets, provided that where the net revenues exceed net costs, those excess revenues shall be credited to customers.[[23]](#footnote-24)

The statute does not, however, define how “prudence” should be determined. The statute requires periodic prudency reviews, including one for coal plant subsidy costs collected from consumers during 2020.[[24]](#footnote-25)

## The Audit Reports revealed that AEP, Duke and DP&L overcharged consumers $105 million in above-market price coal plant subsidy costs during 2020.

The PUCO-ordered Audit Reports showed that AEP, Duke and DP&L overcharged consumers $105 million in above-market price coal plant subsidy costs during 2020, as shown below:

**Table 1: H.B. 6 Coal Plant Subsidy Overcharges During 2020**

|  |  |
| --- | --- |
| **Utility** | **Amount of Overcharge** |
| Duke | $29,974,510.91[[25]](#footnote-26) |
| DP&L | $7,652,653.04[[26]](#footnote-27) |
| AEP | $67,897,705.58[[27]](#footnote-28) |
| Total: | $105,524,869.53 |

AEP, Duke and DP&L overcharged consumers $105 million in 2020 even though consumers were suffering the effects of the Covid pandemic. In other words, during the state of emergency declared by Governor DeWine,[[28]](#footnote-29) the utilities created another emergency condition of their own making for consumers.

# III. ARGUMENT

## A. AEP, Duke and DP&L have the burden of proof to demonstrate that the coal plants were operated prudently, in the best interest of consumers and consistent with how a merchant coal plant owner would have bid the plants into the PJM Day-Ahead Energy market.

Under H.B. 6, the PUCO must determine “the prudence and reasonableness of the actions of electric distribution utilities with ownership interests in the legacy generation resource, including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable.”[[29]](#footnote-30)

The Ohio statutes do not define “prudence” in the context of the coal plant bailout.[[30]](#footnote-31) One generally accepted definition of “prudence” is:

Carefulness, precaution, attentiveness, and good judgment as applied to action or conduct. That degree of care required by the exigencies or circumstances under which it is to be exercised. This term, in the language of law is commonly associated with “care” and “diligence” and contrasted with “negligence.” [[31]](#footnote-32)

The Ohio Supreme Court has defined a prudent decision as:

One which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision making process of the utility’s management.[[32]](#footnote-33)

Earlier PUCO rulings define “prudence” in the context of coal plant subsidy costs. Prior to the enactment of H.B. 6, AEP sought to collect coal plant subsidy costs in Case No. 14-1693-EL-RDR.[[33]](#footnote-34) The PUCO stated that AEP Ohio must meet the following prudency test:

Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the units was not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues. *As noted above, AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers*. [[34]](#footnote-35)

The PUCO stated that the prudency review should follow the same type of analysis used in a Fuel Adjustment Clause analysis.[[35]](#footnote-36) Under a traditional Fuel Adjustment Clause analysis, the PUCO would only allow “the purchasing utility to recover through the fuel adjustment clause the total energy charge for purchased power if that total charge is less than the fuel cost of self-generation.”[[36]](#footnote-37)

In the present case, the PUCO issued a Request for Proposal to hire an Auditor for the prudency review.[[37]](#footnote-38) The PUCO’s Request for Proposal required the Auditor to review the costs and to apply the same type of prudency analysis as used by the PUCO in Case No. 14-1693-EL-RDR. The Request for Proposal states that “the audit shall investigate the prudency of all costs and sales flowing through the EDU riders and demonstrate that the Companies’ actions were in *the best interest of retail ratepayers*.”[[38]](#footnote-39)

As explained below, AEP, Duke and DP&L failed to meet their burden of proof to show that the coal plants were operated prudently, consistently with how a competitive merchant coal plant owner would have run the plants and in the best interest of retail ratepayers. The PUCO should therefore disallow the entire $105 million in overcharges.

## B. The Auditor failed to follow the PUCO’s Request for Proposal, which required the Auditor to determine whether the coal plants were operated “in the best interest of retail ratepayers.” AEP, Duke and DP&L therefore failed to meet their burden to prove that the coal plants were operated “in the best interest of retail ratepayers.” The PUCO should therefore disallow the entire $105 million in overcharges.

As explained in Section III(A) above, the PUCO issued a Request for Proposal which expressly required that “the audit shall investigate the prudency of all costs and sales flowing through the EDU riders and demonstrate that the Companies’ actions were in *the best interest of retail ratepayers*.”[[39]](#footnote-40) The Auditor, however, failed to make this finding.

The Auditor admitted that she failed to make this PUCO-required finding in the following exchange:

Q. I want to back up a moment and go back to the scope of the audit reports that you performed. And one of the questions I have is that as part of your prudency review, did you determine whether the utilities’ actions were in the best interests of retail ratepayers?

A. No.[[40]](#footnote-41)

The Auditor reiterated this point later in her testimony:

Q. (By Mr. Finnigan) Do you have any opinion as to whether the OVEC rider in 2020 was in the best interests of retail ratepayers?

A. We didn’t look at the concept of best interest.[[41]](#footnote-42)

The Auditor failed to make this “best interest of the retail ratepayer” finding even though the PUCO expressly required this as part of the prudency audit. Granted, it is impossible to conceive that a $105 million overcharge would be in the retail ratepayers’ best interest. The PUCO should therefore disallow the entire $105 million in overcharges because AEP, Duke and DP&L failed to meet their burden of proof that the coal plant subsidy costs were in the best interest of retail ratepayers.

## C. The Auditor failed to follow R.C. 4928.148(A)(1), which requires the Auditor to determine the prudence of “decisions related to offering the contractual commitment into the wholesale markets.”[[42]](#footnote-43) AEP, Duke and DP&L therefore failed to meet their burden to prove that such decisions were prudent. The PUCO should therefore disallow the entire $105 million in overcharges.

The Auditor failed to follow R.C. 4928.148(A)(1), which required the Auditor to determine the prudence of “decisions related to offering the contractual commitment into the wholesale markets.”[[43]](#footnote-44) These decisions were made at times by an OVEC Operating Committee written procedure and at other times by OVEC management. The Auditor failed to determine whether these daily decisions were made prudently. AEP, Duke and DP&L therefore failed to meet their burden to proof, and the overcharges should be disallowed.

As explained above, the energy from the coal plants is sold into the PJM Day-Ahead Energy market. Every day, a plant must be “committed” as “must-run” or “economic.” “Must-run” (also known as “self-scheduled”) means that the plant will run for that day, regardless of whether the market prices are high enough to cover the plant’s costs. “Economic,” as the term implies, means that the plant will run for that day only if the market prices are high enough to cover the plant’s costs.

The Auditor explained this difference between “must-run” and “economic” commitment as follows:

**Disposition of energy and capacity**: OVEC energy and capacity are sold into the PJM markets. OVEC typically self-schedules its units in the PJM day-ahead market (in other words, OVEC informs PJM that a unit’s availability status is “must-run”). The alternative to must-run availability status for a unit which is not on outage is to offer the unit so that it may be committed by PJM (in other words, OVEC would inform PJM that the unit’s availability status is “economic”). Must-run units are committed by the market participant and then dispatched by PJM without regard to whether the hourly energy price is high enough to cover the unit’s fuel and variable costs.[[44]](#footnote-45)

The Auditor further explained that the OVEC Operating Committee (comprised of all OVEC co-owners) has a written procedure requiring that the coal plants be committed on a “must-run” basis at all times, unless the co-owners unanimously agree otherwise.[[45]](#footnote-46) During a few months in 2020, the OVEC Operating Committee delegated authority to OVEC management to make these daily commitment decisions.[[46]](#footnote-47)

The Audit Reports were deficient because the Auditor only examined whether the individual actions of AEP, Duke and DP&L were reasonable. The Auditor did not review whether the daily commitment decisions by the OVEC Operating Committee or OVEC management were prudent. The Auditor confirmed this in her following testimony:

Q. But as you sit here today, you don’t remember reviewing any information that OVEC might have used to make those commitment decisions?

A. For example, we didn’t, for example, ask what was your projection of energy price over the next few weeks. So, no, we did not ask.[[47]](#footnote-48)

The Auditor was required under R.C. 4928.148(A)(1) to determine the prudence of “decisions related to offering the contractual commitment into the wholesale markets.”[[48]](#footnote-49) This is a statutory requirement which can neither be waived nor excused. The Auditor failed to examine the prudency of the daily commitment decisions because she did not examine the economic analysis (or lack thereof) underpinning such decisions by the OVEC Operating Committee or OVEC management. AEP, Duke and DP&L therefore failed to meet their burden of proof and the full $105 million in overcharges should be disallowed.

## D. The coal plants were committed into the Day-Ahead Energy market as “must-run” during most of the year. The coal plants’ variable fuel and O&M costs, however, exceeded the PJM revenues from the sale of electricity. This led to the $105 million in overcharges. It was imprudent and not in consumers’ best interest to commit the plants as “must-run” when these significant losses were foreseeable. The PUCO should therefore disallow the overcharges.

As discussed in Section III(C)above, the coal plants were committed into the Day-Ahead Energy market as “must-run” during most of 2020. During these times, the coal plants’ variable operating costs (fuel and variable O&M) exceeded the market price of the electricity generated by the fuel.[[49]](#footnote-50) Nevertheless, the coal plants were committed as “must-run” during these periods. This directly led to the overcharges and was imprudent and not in consumers’ best interest. The PUCO should therefore disallow the entire $105 million in above-market costs.

OCC witness Dr. Elizabeth Stanton identified two problems arising from OVEC’s use of the “must-run” commitment:

1. if the units are operating when the energy price (or locational marginal price (LMP)) is lower than the units’ energy costs then consumers are paying a premium; and
2. by opting out of economic commitment from PJM, the units forgo the collection of “make whole” payments that would compensate them if they were market-committed by PJM and did not recover their energy costs for that day.[[50]](#footnote-51)

Dr. Stanton compared the PJM energy market prices versus the OVEC fuel and variable costs throughout 2020.[[51]](#footnote-52) Using Duke as an example, she found that OVEC’s costs were 20% higher than the PJM energy market price, on average, for the entire year.[[52]](#footnote-53) Dr. Stanton then analyzed how many days this occurred during 2020. She determined that up to 88% of the time during 2020, OVEC operated the coal plants when their costs exceeded PJM energy market revenues.[[53]](#footnote-54) She recommended that “the Companies’ consumers should not pay for any excess costs associated with the self-scheduling of these units.”[[54]](#footnote-55)

Dr. Stanton also noted that the Michigan Public Service Commission has already denied AEP’s request to collect the same 2020 coal plant subsidy costs:

Q25. HAVE EXCESSIVE OVEC COSTS BEEN DENIED IN ANY OTHER JURISDICTIONS?

A25. Yes. The Michigan Public Service Commission (MPSC) recently disallowed $1.347 million in 2020 power supply costs associated with the OVEC units that Indiana Michigan Power (I&M), a subsidiary of AEP, was requesting.[[55]](#footnote-56) This disallowance level was developed from the Attorney General comparing the costs of the OVEC contract ($65.46 per MWh) that were incurred with two other long-term power transactions in Michigan that were lower-cost.[[56]](#footnote-57) The MPSC ultimately agreed with this comparison, admonishing I&M because it “stubbornly refused to provide any other meaningful basis for comparison” to support the recovery of the OVEC units’ costs.[[57]](#footnote-58) I&M also “does not challenge” the accuracy of the Attorney General’s cost comparison.[[58]](#footnote-59) The MPSC had previously stated its position that long-term contracts need to be re-evaluated after signing because the existence of the contract does not “absolve a utility from monitoring and responding to market conditions.”[[59]](#footnote-60)

OCC witness Joseph Perez further testified that running the plants with a must-run designation was not prudent and “not consistent with how merchant coal plant operators attempting to maximize revenues would bid their plants into the PJM Day-Ahead Energy Market.”[[60]](#footnote-61) Mr. Perez further testified that, when choosing between a “must-run” and an “economic” commitment status, the owner should do a “daily analysis of the costs and expected revenues from participating in the Day-Ahead Energy Market” and that this analysis “should cover not only that day, but the next several days ahead for units that are not easily turned on and off.”[[61]](#footnote-62)

Mr. Perez testified that during the audit period, OVEC’s costs exceeded the market price of the electricity OVEC generated nearly the entire year, as shown on Figure 30 from the Duke Audit Report below:[[62]](#footnote-63)

Figure 1: OVEC energy charges and monthly average PJM market prices

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Description automatically generated

Mr. Perez noted that, per this chart, OVEC’s energy costs were higher than PJM energy market prices, on average, for ten out of twelve months during 2020.[[63]](#footnote-64) He further explained that this table does not include OVEC’s operation and maintenance costs; therefore, the chart shows that OVEC’s coal supply cost, by itself, was higher than PJM electricity market prices most of the year in 2020.[[64]](#footnote-65) Mr. Perez testified that if OVEC’s operation and maintenance costs were included in this table, the “results would likely show all twelve months created even larger charge to consumers for the coal plant subsidy, with no credits.[[65]](#footnote-66)

Mr. Perez concluded that OVEC should have used a daily economic analysis to inform its daily decisions “to either designate the plant as economic or shut down the plant until prices recover.”[[66]](#footnote-67) He noted that Duke follows this practice for its non-OVEC plants, but this practice wasn’t applied to the OVEC plants.[[67]](#footnote-68) Mr. Perez further concluded that OVEC failed to operate the plants consistently with how merchant coal plant owners attempting to maximize revenues would bid their plants into the PJM Day-Ahead Energy market or in the best interest of retail ratepayers.[[68]](#footnote-69)

In the present case, R.C. 4928.148 allows utilities to seek collection of coal plant subsidy costs, but the statute requires that the costs must be prudently incurred.[[69]](#footnote-70) Here they were not. Dr. Stanton and Mr. Perez’s testimony clearly showed that running the coal plants when fuel and variable operation and maintenance costs exceeded electricity market prices was not prudent or in the best interest of consumers.

Other utility commissions have disallowed costs associated with the continued investment in uneconomic generation. It is well settled that a utility’s obligation to analyze the prudence of an investment is not a static or “one-and-done” responsibility. Instead, the utility has an ongoing obligation to evaluate the *continuation* of an investment as well as its decision to enter into and *remain* in that particular investment.[[70]](#footnote-71) This requires the utility to respond prudently to changing circumstances or new economic or regulatory challenges that arise during the entire lifetime of a coal plant investment.

Applying this rule, several public utility commissions have disallowed costs associated with a utility’s continued investment in uneconomic generation plants. For example, in *Gulf States v. Pub. Serv. Comm’n,[[71]](#footnote-72)* the court affirmed the Louisiana Public Service Commission’s disallowance of costs associated with the continued investment in risky nuclear generation where, as here, the utility failed to adequately evaluate viable and economically beneficial alternatives and was aware of, but failed to take into account, the “adverse cost trends” and “dramatically increased” financial risks involved with the continued operation of the plant.

As noted above, Dr. Stanton discussed the Michigan Public Service Commission’s decision rejecting AEP’s attempt to collect 2020 OVEC costs.[[72]](#footnote-73) The Michigan Court of Appeals issued a ruling on January 18, 2024 affirming this ruling.[[73]](#footnote-74) The Michigan Court of Appeals stated:

The PSC in the present case did not ‘explicitly order’ [AEP] to enter into or abrogate a particular contract; rather, it passed the losses associated with the ICPA on to [AEP’s] shareholders instead of on to ratepayers. See, e.g., Kentucky West Virginia Gas Co v Pennsylvania Pub Utility Comm, 837 F2d 600, 609 (CA 3, 1988) (‘Regarding the states’ traditional power to consider the prudence of a retailer’s purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred; those should be borne by the stockholders, not the rate payers.’).[[74]](#footnote-75)

The PUCO should afford consumers the same level of consumer protection as the Michigan Public Service Commission. The days of Michigan beating Ohio should end.

Another state commission remarked on the unfairness of passing on overcharges to consumers: “If a competitive enterprise tried to impose on its customers costs from imprudent actions, the customers could take their business to a more efficient provider. A utility’s ratepayers have no such choice.”[[75]](#footnote-76)

The United States Supreme Court long ago stated that consumer rights are violated when a utility operates its business for the purpose of covering operating expenses and paying shareholder dividends, without regard to the impact on consumers:

[T]he rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but, in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.[[76]](#footnote-77)

AEP, Duke and DP&L ignored the consumer impacts from running the coal plants. They ran the coal plants without any regard for the fair value of the electricity generated by the coal plants. This resulted in a massive loss of $105 million during 2020. AEP, Duke and DP&L ran the plants in a manner which allowed them to “meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders”[[77]](#footnote-78) but without any regard for “the best interest of retail ratepayers.” The PUCO should therefore disallow the entire $105 million overcharge.

## E. The coal plants were not committed into the Day-Ahead Energy market in a manner consistent with how a merchant plant owner seeking to maximize profits would have operated. AEP, Duke and DP&L’s failure to operate the plants in the same manner as a merchant coal plant owner seeking to maximize profits was imprudent and violated R.C. 4928.148. The PUCO should therefore disallow the full $105 million in overcharges.

Revised Code Section 4928.148 requires the PUCO to review “the prudence and reasonableness of actions of electric distribution utilities … including their decisions related to offering the contractual commitment into the wholesale markets, and exclude from recovery those costs that the commission determines imprudent and unreasonable.”[[78]](#footnote-79) As discussed in Section III(A) above, the PUCO has ruled that: “Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the units *was not bid in a manner consistent with participation in a broader competitive marketplace of sellers attempting to maximize revenues*.”[[79]](#footnote-80) AEP, Duke and DP&L failed to meet this standard, so the PUCO should disallow the full amount of the coal plant subsidy costs.

OCC witness Joseph Perez explained how merchant coal plant owners run their plants.[[80]](#footnote-81) He presented an analysis from Potomac Economics, the Independent Market Monitor for MISO.[[81]](#footnote-82) MISO operates wholesale energy markets which are substantially similar to the PJM wholesale energy markets.[[82]](#footnote-83) The following table from a Potomac Economics report shows that merchant coal plant owners rarely run their plants when costs exceed energy market prices.[[83]](#footnote-84) In fact, this only occurred 3% of the time during the entire 2017-2020 period, as shown below.[[84]](#footnote-85)

A screenshot of a graph

Description automatically generated

In contrast, the AEP, Duke and DP&L coal plants operated up to 88% of the days during 2020 when plant costs exceeded energy market revenues.[[85]](#footnote-86) The Potomac Economics report clearly shows that the AEP, Duke and DP&L coal plants were not operated “consistent with participation in a broader competitive marketplace of sellers attempting to maximize revenues.”[[86]](#footnote-87)

Comparing the Potomac Economics report to AEP, Duke and DP&L’s actual practice shows the stark contrast between the incentives in competitive markets versus regulated markets. As one state public utility commission stated: “While market forces impose prudency on sellers attempting to maximize revenues in a competitive market, [m]anagement of unregulated business subject to the free interplay of competitive forces have no alternative to efficiency. If they are to remain competitive, they must constantly be on the lookout for cost economies and cost savings. Public utility management, on the other hand, does not have quite the same incentive.”[[87]](#footnote-88)

AEP, Duke and DP&L had no disincentive to incur above-market costs. In a competitive market, the owner of an unprofitable coal plant would be unable to impose those above-market costs on consumers, who “could take their business to a more efficient provider.”[[88]](#footnote-89) This is why the merchant coal plant owners in MISO only ran their plants 3% of the time when costs exceeded market prices. But AEP, Duke and DP&L ran the OVEC plants 88% of the time when costs exceeded market prices.[[89]](#footnote-90)

The PUCO should hold AEP, Duke and DP&L to the same standard as a merchant coal plant owner. In fact, the PUCO expressly ruled it would do so.[[90]](#footnote-91) AEP Duke and DP&L were well aware of the PUCO ruling. Yet they ignored the standard.

AEP, Duke and DP&L’s continuous use of a “must-run” commitment strategy during 2020 was imprudent, was not in the best interest of consumers and was inconsistent with how merchant coal plant owners seeking to maximize revenues operated their plants. The PUCO should therefore disallow the entire $105 million in above-market electricity costs.

## F. The PUCO should disallow AEP, Duke and DP&L’s collection of $2.51 million as a return on equity (*i.e.,* profit) on the coal plant subsidy charges, which directly violates R.C. 4928.148.

During the audit period, AEP, Duke and DP&L collected $2.51 million as a return on equity (or profit) on the coal plant subsidy charges.[[91]](#footnote-92) This directly violates R.C. 4928.148. The PUCO should therefore disallow this cost.

The return on equity for the coal plants is referred to “Component D.” The Auditor explained how Component D is calculated as follows:

an amount equal to the product of $2.089 multiplied by the total number of shares of capital stock of the par value of $100 per share,” [which] amounts to $2.51 million per year, which is ultimately paid by ratepayers including DEO’s customers. ORC 4928.01(A)(42) requires that “*Prudently incurred costs . . . must exclude any return on investment in common equity . . .*” Component D seems to be a such a return. Though it is not a large share of the overall OVEC bill to ratepayers, the $2.51 million per year amounted to nearly all OVEC’s $2.81 million of net income in 2020.[[92]](#footnote-93)

Under R.C. 4928.148(A), a utility can only collect “prudently incurred costs related to a legacy generation resource.”[[93]](#footnote-94) The term “prudently incurred costs related to a legacy generation resource” is defined by R.C. 4928.01(A)(42), which states that “[s]uch costs shall exclude any return on investment in common equity . . .”[[94]](#footnote-95)

It’s bad enough that AEP, Duke and DP&L overcharged consumers for $105 million in imprudent, above-market price electricity costs during the height of the Covid pandemic. But to add on a profit margin, in direct violation of Ohio law, is unconscionable. The PUCO should disallow this cost.

## G. The PUCO should disallow AEP, Duke and DP&L’s share of the $30 million “advance debt repayment” collected during 2020. This directly violates R.C. 4928.148 and R.C. 4928.01(A)(42) as well as the regulatory principle of intergenerational equity. The PUCO also should also require the utilities to credit consumers with AEP, Duke and DP&L’s share of the $120 million in “advance debt repayment” collected to date.

During the audit period, AEP, Duke and DP&L collected their share (based on their ownership shares in OVEC) of a $30 million “advance debt repayment” for the coal plants.[[95]](#footnote-96) OVEC billed a total of $120 million in “advance debt repayment” to date. This directly violates R.C. 4928.148 and R.C. 4928.01(A)(42) and creates intergenerational inequity, where current consumers are burdened by paying for the debt repayment that benefits future consumers. This creates an imbalance in the distribution of costs and benefits of utility services across different generations of consumers. This violates the regulatory principle of intergenerational equity, which holds that one generation of consumers should not subsidize a different generation of consumers.[[96]](#footnote-97) the. The PUCO should therefore disallow the utilities’ share of the $30 million collected during 2020. The PUCO should also require the utilities to credit consumers for the utilities’ share of the $120 million in “advance debt repayment” collected to date.

As noted above in Section III(G),R.C. 4928.148(A) provides that a utility can only collect “prudently incurred costs related to a legacy generation resource.”[[97]](#footnote-98) The term “prudently incurred costs related to a legacy generation resource” is defined by R.C. 4928.01(A)(42), which states that such costs shall include “costs, including deferred costs, allocated pursuant to a power agreement approved by the federal energy regulatory commission that relates to a legacy generation resource….” The statute further provides that in the event of a premature retirement of a legacy generation resource, [such costs] shall exclude any recovery of remaining debt.”[[98]](#footnote-99) The “advance debt repayment” should be disallowed for three independent reasons: (1) it is not a “cost” as defined above; (2) it could be used improperly to repay debt in the event of an early retirement; and (3) it violates the regulatory principle of intergenerational equity.

Regarding the first reason for disallowance, additional guidance on “costs” can be found in R.C. 4909.15. This statute requires the PUCO to set a utility’s rates based on several factors including “[t]he cost to the utility of rendering the public utility service for the test period.”[[99]](#footnote-100) The statute further states that “the revenues and expenses of the utility shall be determined during a test period,” which is defined as a twelve-month period.[[100]](#footnote-101) Using this guidance, the “costs” which can be collected under R.C. 4928.148 and R.C. 4928.01(A)(42) should be viewed as those incurred during the twelve months of 2020. The “advance debt repayment” does not meet this test and so should be disallowed.

The “advance debt repayment” is explained in OVEC’s 2020 Annual Report as follows:

In January 2017, the Companies started advance billing the Sponsoring Companies for debt service as allowed under the ICPA. As of December 31, 2020 and 2019, $120 million and $90 million, respectively, had been advance billed to the Sponsoring Companies. *As the Companies have not yet incurred the related costs*, a regulatory liability was recorded which will be credited to customer bills on a long-term basis.[[101]](#footnote-102)

The Annual Report also establishes that $30 million in “advance debt repayment” was collected during 2020 (*i.e.,* the difference in the $120 million advance billed as of December 31, 2020 and the $90 million advance billed as of December 31, 2019). As stated in the Annual Report, OVEC has “not yet incurred the related costs” for which the “advanced debt repayment” was collected.

AEP, Duke and DP&L should not have collected their share of the $30 million during 2020 because it was collected to pay *future* costs. AEP, Duke and DP&L are not allowed to collect future debt costs when they file a rate case. Nor should they be allowed to collect future debt costs on behalf of their affiliate (OVEC). This is the first reason these costs should be disallowed. Future costs fall outside the allowable costs which can be collected under R.C. 4928.148 and R.C. 4928.01(A)(42).

The amount should be disallowed for a second, and independent, reason – the amount collected could be used improperly to pay down debt in the event of the coal plants’ early retirement. This is expressly prohibited by R.C. 4928.01(A)(42) (“in the event of a premature retirement of a legacy generation resource, [such costs] shall exclude any recovery of remaining debt.”[[102]](#footnote-103)

The coal plants were built in 1955.[[103]](#footnote-104) The coal plants are governed by an Inter-Company Power Agreement, which provides for the plants to run through June 30, 2040.[[104]](#footnote-105) The coal plant subsidy statute is only in effect through 2030.[[105]](#footnote-106) Once the “advance debt repayment” funds are collected, consumers and the PUCO lose all control over how the funds are used. By 2040, the coal plants would be 85 years old. It is entirely plausible that the plants could be retired prior to that date, especially given the massive losses they are incurring today. The “advance debt repayment” would allow OVEC to use the funds to pay down debt after declaring an early retirement, in violation of R.C. 4928.148 and R.C. 4928.01(A)(42). The PUCO should therefore disallow AEP, Duke and DP&L’s share of the $30 million “advance debt repayment” collected during 2020.

The third and final reason for disallowing this amount is because it violates the principle of intergenerational equity. This principle has been explained as follows:

Intergenerational Equity. The Commission must balance customers’ interests over time, known as intergenerational equity. When determining the period over which utilities will recover the costs of assets incurred to produce future benefits, as well as the period over which customers will receive the benefit of utility cost savings, the Commission attempts to equitably allocate those costs and benefits to customers over time so no one generation of customers receives an inequitable share.[[106]](#footnote-107)

The “advance debt repayment” violates the principle of intergenerational equity because current utility consumers are forced to pay for costs not yet incurred and for which they could receive no benefit. This is the third and final reason why AEP, Duke and DP&L’s share of the $30 million collected during 2020 should be disallowed.

In addition to this disallowance, the PUCO should order the utilities to credit consumers for AEP, Duke and DP&L’s share of the full $120 million of “advance debt repayment” collected to date. It is unjust and unreasonable that AEP, Duke and DP&L have collected these amounts from consumers.

## H. The PUCO should require AEP, Duke and DP&L to credit consumers for their share of the “advance postretirement benefit payments” collected during 2020 and the $64 million collected to date. This amount was collected in direct violation of R.C. 4928.148 and R.C. 4928.01(A)(42) and the regulatory principle of intergenerational equity.

Like the “advance debt repayment” discussed in Section III(G) above, AEP, Duke and DP&L also advance-billed for postretirement benefits even though these costs were not yet incurred and were recorded in violation of Generally Accepted Accounting Principles (“GAAP”).[[107]](#footnote-108) These amounts should be credited to consumers because they were collected in violation of R.C. 4928.148 and R.C. 4928.01(A)(42) and the regulatory principle of intergenerational equity.

OVEC’s 2020 balance sheet lists a “regulatory liability” of $64,415,536 for postretirement benefits in 2020.[[108]](#footnote-109) However, this was not a true regulatory liability because this amount was not yet owed for postretirement benefits – it was advance-billed like the “advance debt repayment.” This is explained in the OVEC Annual Report 2020 as follows:

The regulatory liability for postretirement benefits recorded at December 31, 2020 and 2019, represents *amounts collected in historical billings in excess of the accounting principles generally accepted in the United States of America (GAAP)* net periodic benefit costs, including a termination payment from the DOE in 2003 for unbilled postretirement benefit costs, and incremental unfunded plan obligations recognized in the balance sheets but not yet recognizable in GAAP net periodic benefit costs.[[109]](#footnote-110)

This violates the PUCO’s policy for postretirement benefit ratemaking and accounting. The PUCO’s policy is to use accrual accounting for both ratemaking and regulatory liability purposes for postretirement benefits.[[110]](#footnote-111) The PUCO’s policy is in accordance with GAAP and is set forth in FASB 106.[[111]](#footnote-112) OVEC’s Annual Report acknowledges that the $64,415,536 is *in excess of what it is required to collect under GAAP’s accrual accounting principles.[[112]](#footnote-113)*

Despite this surplus in the postretirement benefits account, AEP, Duke and DP&L nevertheless charged consumers for this expense during 2020.[[113]](#footnote-114) Like the “advance debt repayment” discussed in Section III(G) above, the PUCO should order the utilities to credit consumers for AEP, Duke and DP&L’s share of the postretirement benefit expense collected during 2020 as well as their share of the full $64,415,536 in advance postretirement benefit charges collected to date. It is unjust and unreasonable that AEP, Duke and DP&L have collected these amounts from consumers. The PUCO’s policy on postretirement benefits prohibits the utilities from collecting future postretirement benefit costs, so AEP, Duke and DP&L should not be allowed to collect such future costs directly for the benefit of their affiliate.

## I. The Attorney Examiners erred by excluding evidence relating to an earlier audit of the coal plants where the PUCO Staff asked the London Economics Auditor to retract her opinion that running the plants was *not* “in the best interest of retail ratepayers.” The present case involves the same Auditor, the same PUCO Staff, the same coal plants and the same type of above-market energy costs. The excluded evidence was highly relevant to prove London Economics’ (and PUCO’s) bias, prejudice and lack of independence from utility influence. The Attorney Examiners also erred by prohibiting cross-examination on these issues.

The Attorney Examiners erred by excluding highly relevant evidence of the Auditor’s (and the PUCO’s) bias, prejudice and lack of independence.[[114]](#footnote-115) These rulings violated OCC’s substantial due process rights. The PUCO should overrule these evidentiary rulings, re-open the evidentiary hearing and allow OCC to introduce the evidence and conduct cross-examination on these issues.

As background, London Economics prepared the three Audit Reports in the present case.[[115]](#footnote-116) The present audits involve coal plant subsidy costs for 2020.[[116]](#footnote-117) London Economics also prepared: (1) an Audit Report for AEP’s coal plant subsidy costs in 2019;[[117]](#footnote-118) and (2) an Audit Report for Duke’s coal plant subsidy costs for 2019.[[118]](#footnote-119) All five Audit Reports involved the same London Economics Auditor, the same PUCO Staff, the same coal plants and the same types of costs. All five Audit Reports are organized and presented the same way and much of the language is identical in all five reports.

The 2019 AEP Audit Report was prepared first. During that Audit, the PUCO Staff asked the London Economics Auditor to withdraw her initial conclusion that “keeping the plants running does not seem to be in the best interests of the ratepayers.”[[119]](#footnote-120) The PUCO Staff asked London Economics to use “a milder tone and intensity” in place of this language.[[120]](#footnote-121) The London Economics Auditor removed this statement from her draft Audit Report in response to the PUCO Staff’s request.[[121]](#footnote-122) These communications between the PUCO Staff and the London Economics Auditor are reflected in a series of emails.[[122]](#footnote-123) The emails are located at Attachment JSP-3 to Mr. Perez’s testimony and at OCC Ex. 10.[[123]](#footnote-124)

At issue are three areas of rulings on the admissibility of the emails and related cross-examination. First, the Attorney Examiners improperly excluded OCC Ex. 10 (copies of the above-referenced emails between PUCO Staff and the Auditor from the 2019 AEP Audit Report).[[124]](#footnote-125)

Second, the Attorney Examiners improperly excluded OCC witness Joseph Perez’s testimony identifying the emails[[125]](#footnote-126) and his testimony explaining how the emails reflected the Auditor’s bias and lack of independence.[[126]](#footnote-127) The Attorney Examiners also improperly excluded Mr. Perez’s recommendation that the PUCO should give little or no weight to the Audit Reports in this case due to the Auditor’s bias and lack of independence as reflected in the emails.[[127]](#footnote-128)

Finally, the Attorney Examiners improperly prohibited OCC’s attorney from asking several questions related to the emails during cross-examination of the Auditor –

questions which were intended to establish the Auditor’s bias, prejudice and lack of independence.[[128]](#footnote-129)

These evidentiary rulings were erroneous and violated OCC’s substantial due process rights.[[129]](#footnote-130) These improper rulings had a significant impact on the evidentiary record for the case and could lead to an unjust and unreasonable result. The Attorney Examiners’ rulings were improper for several reasons. First, the Attorney Examiners incorrectly concluded that the evidence was not relevant and that any probative value was outweighed by the prejudicial impact of the evidence.[[130]](#footnote-131) To the contrary, the evidence was relevant, the relevance was not outweighed by any prejudicial impact and the evidence was also admissible for impeachment purposes.

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”[[131]](#footnote-132) In complex business matters such as this case, courts generally grant parties wide latitude in admitting evidence which might explain a party’s intent or actions.[[132]](#footnote-133) Draft documents (like these emails) can be highly relevant to show a party’s intent.[[133]](#footnote-134)

The excluded evidence was probative of the Auditor’s true opinion as to whether running the plants was in the best interests of consumers. The excluded evidence showed that PUCO Staff expressed concern that the Auditor’s finding was too critical of AEP. The excluded evidence further showed that the Auditor changed her opinion on whether running the plants was in consumers’ best interest after PUCO Staff expressed concern about the “tone and intensity.”

The excluded evidence was therefore highly relevant to prove three key points: (1) the Auditor’s real opinion was that operating the plants was not in the best interests of consumers; (2) the Auditor was biased and prejudiced in AEP, Duke and DP&L’s favor and against consumers’ interests; and (3) the Audit Reports were not independent audits, as required by PUCO the Request for Proposals.[[134]](#footnote-135)

Relevant evidence is generally admissible.[[135]](#footnote-136) Relevant evidence can be excluded if it might cause confusion of the issues, but only if the probative value is substantially outweighed by the danger of confusion.[[136]](#footnote-137) This case will ultimately be decided by PUCO Commissioners who are experts in utility regulation and who have decided many cases relating to OVEC over the years. Under these circumstances, there is little or no risk that any danger of confusion would substantially outweigh the probative value of the excluded evidence.

The PUCO ordered an independent audit in this case.[[137]](#footnote-138) The excluded evidence was also admissible for impeachment purposes. OCC’s attorney should have been allowed to cross-examine the Auditor on these issues in order to impeach the Auditor’s credibility by showing that she was biased and prejudiced and did not act independently. OCC’s attorney should have also been allowed to cross-examine the Auditor on these emails to impeach the Auditor’s credibility on these issues.[[138]](#footnote-139)

Ohio R.Evid. 611(B) states that “cross-examination shall be permitted on all relevant matters and matters affecting credibility.” Ohio R.Evid. 616(A) provides that a witness can be impeached with evidence of bias, prejudice, or motive to misrepresent. The excluded evidence therefore should have been admitted for impeachment purposes.[[139]](#footnote-140)

The excluded evidence was admissible because it was highly relevant, and the relevant value was not outweighed by any realistic risk of prejudicial impact. The probative value of the evidence greatly outweighed any risk of confusion, given the fact that the PUCO Commissioners are experienced and sophisticated in deciding these types of cases. The excluded evidence was also admissible for impeachment purposes. Under the circumstances, the Attorney Examiners violated OCC’s substantial rights by excluding this evidence. The PUCO should overrule these evidentiary rulings, re-open the evidentiary hearing and allow OCC to introduce the evidence and conduct cross-examination on these issues.

# IV. CONCLUSION

AEP, Duke and DP&L failed to operate the coal plants prudently, in the best interest of consumers and consistent with practices followed by merchant coal plant owners seeking to maximize revenues. The PUCO should therefore disallow the full $105 million in above-market price coal plant subsidy charges.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Initial Brief for Consumer Protection has been served electronically upon those persons listed below this 12th day of February 2024.

*/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:

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1. R.C. 4928.148. The statute allows the utilities to request cost collection for two coal plants which the utilities indirectly own and which are operated by the Ohio Valley Electric Corporation (“coal plant subsidy costs”). [↑](#footnote-ref-2)
2. *Emp. Retirement Sys. of City of St. Louis v. Jones,* Case No. 2:20-cv-4813, Order of Final Settlement Approval at 17 (Aug. 23, 2022) (emphasis added). [↑](#footnote-ref-3)
3. *United States v. FirstEnergy Corp.,* Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021). [↑](#footnote-ref-4)
4. Hearing Transcript Vol. I, pp. 124-125 (Nov. 14, 2023). [↑](#footnote-ref-5)
5. *Id.* [↑](#footnote-ref-6)
6. Entry, Request for Proposals at 6 (May 5, 2021). [↑](#footnote-ref-7)
7. OCC Ex. 7, OVEC Annual Report-2020 at 1. [↑](#footnote-ref-8)
8. Citizens Utility Board of Ohio and Union of Concerned Scientists Ex. 1, Direct Testimony of Devi Glick (“Glick Testimony”) at 12 (Oct. 10, 2023). [↑](#footnote-ref-9)
9. *Id.* [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Id.* at 13. [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. *Id.* at 12. [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *Id.* at 13. [↑](#footnote-ref-17)
17. *Id*. at 8. [↑](#footnote-ref-18)
18. *Id*. at 10. [↑](#footnote-ref-19)
19. Staff Ex. 6, Duke Audit Report at 40-41 (Dec. 17, 2021). *See also,* DP&L Ex. 1, Direct Testimony of David J. Crusey, Ex. 1, Amended and Restated Inter-Company Power Agreement dated as of Sept. 10, 2010 (Oct. 3, 2023). [↑](#footnote-ref-20)
20. Staff Ex. 6, Duke Audit Report at 42 (Dec. 17, 2021). [↑](#footnote-ref-21)
21. R.C. 4928.148. [↑](#footnote-ref-22)
22. *Id.* [↑](#footnote-ref-23)
23. R.C. 4928.01(A)(42). [↑](#footnote-ref-24)
24. R.C. 4928.148. [↑](#footnote-ref-25)
25. Staff Ex. 6, Duke Audit Report (Dec. 17, 2021). *See also,* Duke Motion for Protective Order, Attachment 1 at p. 26, Figure 9, column K (Jan. 4, 2024). *See also* Hearing Transcript, Vol. I, pp. 77-78 (Nov. 14, 2023). [↑](#footnote-ref-26)
26. Staff Ex. 2, AES Ohio Audit Report (Dec. 17, 2021). *See also* DP&L Motion for Protective Order, Ex. 1 at p. 25, Figure 9, column labeled “Rider Revenue LGR” (Jan. 4, 2024). *See also,* Hearing Transcript, Vol. I, pp. 76-77 (Nov. 14, 2023). [↑](#footnote-ref-27)
27. Staff Ex. 4, AEP Audit Report (Dec. 17, 2021). *See also* AEP Motion for Protective Order, Attachment A at pp. 28-29, Figure 9, column H (Jan. 4, 2024). *See also* Hearing Transcript, Vol. I, p. 65 (Nov. 14, 2023). [↑](#footnote-ref-28)
28. *In the Matter of the Proper Procedures and Process for the Commission’s Operations and Proceedings During the Declared State of Emergency and Related Matters,* Case No. 20-591-AU-UNC, Entry at ¶ 5 (March 12, 2020). [↑](#footnote-ref-29)
29. R.C. 4928.148(A)(1). [↑](#footnote-ref-30)
30. R.C. 4928.01(A)(42). [↑](#footnote-ref-31)
31. Black’s Law Dictionary Online. [↑](#footnote-ref-32)
32. *Cincinnati v. Pub. Util. Comm*., 67 Ohio St.3d 523, 530, 620 N.E.2d 826, 830 (1993). [↑](#footnote-ref-33)
33. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order (March 31, 2016). [↑](#footnote-ref-34)
34. *Id.*, Opinion and Order at 89 (March 31, 2016). [↑](#footnote-ref-35)
35. *Id.*, Opinion and Order at 86-89 (March 31, 2016) (emphasis added). [↑](#footnote-ref-36)
36. K. Duffy, *Electric Fuel Adjustment Clause Review in Ohio*, Akron Law Review, Vol. 12, Iss. 3 at 478-479 (July 2015). [↑](#footnote-ref-37)
37. Entry, Request for Proposal (May 5, 2021). [↑](#footnote-ref-38)
38. *Id.* (emphasis added). [↑](#footnote-ref-39)
39. *Id.* (emphasis added). [↑](#footnote-ref-40)
40. Hearing Transcript, Vol I, p. 134 (Nov. 14, 2023). [↑](#footnote-ref-41)
41. Hearing Transcript, Vol II, p. 177 (Nov. 15, 2023). [↑](#footnote-ref-42)
42. R.C. 4928.148(A)(1). [↑](#footnote-ref-43)
43. *Id.* [↑](#footnote-ref-44)
44. Staff Ex. 6, Duke Audit Report at 10 (Dec. 17, 2021) (footnotes omitted). [↑](#footnote-ref-45)
45. *Id.* at 40-41. [↑](#footnote-ref-46)
46. *Id.* at 42. [↑](#footnote-ref-47)
47. Hearing Transcript, Vol. I, pp. 130-131 (Nov. 14, 2023). [↑](#footnote-ref-48)
48. *Id.* [↑](#footnote-ref-49)
49. Staff Ex. 6, Duke Audit Report at 9 (Dec. 17, 2021). [↑](#footnote-ref-50)
50. OCC Ex. 1, Direct Testimony of Elizabeth A. Stanton (“Stanton Testimony”) at 18 (Oct. 10, 2023). [↑](#footnote-ref-51)
51. *Id.* at 17. [↑](#footnote-ref-52)
52. *Id.* [↑](#footnote-ref-53)
53. *Id.* at 16. [↑](#footnote-ref-54)
54. *Id.* at 18. [↑](#footnote-ref-55)
55. MI PSC Order, Case No. U-20530, p. 12. Available at: <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/0688y000006ctmIAAQ>. [↑](#footnote-ref-56)
56. *Id.* at 8. [↑](#footnote-ref-57)
57. *Id.* at 12. [↑](#footnote-ref-58)
58. *Id.* [↑](#footnote-ref-59)
59. MI PSC Order, Case No. U-20203, p. 26. Available at: <https://mi-psc.my.site.com/sfc/servlet.shepherd/version/download/068t000000HUDq3AAH>. [↑](#footnote-ref-60)
60. OCC Ex. 2, Direct Testimony of Joseph Perez (“Perez Testimony”) at 3 (Oct. 10, 2023). [↑](#footnote-ref-61)
61. *Id.* at 12. [↑](#footnote-ref-62)
62. *Id.* at 9-10. [↑](#footnote-ref-63)
63. *Id.* at 10. [↑](#footnote-ref-64)
64. *Id.* [↑](#footnote-ref-65)
65. *Id.* [↑](#footnote-ref-66)
66. *Id.* [↑](#footnote-ref-67)
67. *Id.* at 13. [↑](#footnote-ref-68)
68. *Id.* at 15. [↑](#footnote-ref-69)
69. R.C. 4928.148. [↑](#footnote-ref-70)
70. *See, e.g., Appl. of El Paso Elec. Co. for Authority to Change Rates,* Docket No. 5700, 10 P.U.C. BULL 1071, 1984 WL 274081, at \*27 (Tex. Pub. Util. Comm’n Oct. 26, 1984, on modification Dec. 7, 1984). [↑](#footnote-ref-71)
71. 578 So.2d 71 (1991). [↑](#footnote-ref-72)
72. Stanton Testimony at 18-19. [↑](#footnote-ref-73)
73. *Michigan Pub. Serv. Comm’n . . . Indiana Michigan Power Co.*, Case No. 365180, Order (Jan. 18, 2004). [↑](#footnote-ref-74)
74. *Id.* at 15. [↑](#footnote-ref-75)
75. *In re Long Island Lighting Co*., Case No. 27563, 71 PUR 4th 262 (N.Y. Pub. Serv. Comm’n,) (Nov. 16, 1985). [↑](#footnote-ref-76)
76. *Smith v. Ames,* 169 U.S. 466, 544 (1898). [↑](#footnote-ref-77)
77. *Id.* [↑](#footnote-ref-78)
78. R.C. 4928.148(A)(1). [↑](#footnote-ref-79)
79. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016) (emphasis added). [↑](#footnote-ref-80)
80. Perez Testimony at 13-15. [↑](#footnote-ref-81)
81. *Id.*  [↑](#footnote-ref-82)
82. Stanton Testimony at 20. [↑](#footnote-ref-83)
83. Perez Testimony at 14. [↑](#footnote-ref-84)
84. *Id.* [↑](#footnote-ref-85)
85. Stanton Testimony at 16. [↑](#footnote-ref-86)
86. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider,* Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016). [↑](#footnote-ref-87)
87. *Midwestern Gas Transmission Co. v. E. Tenn. Nat. Gas Co*., 36 FPC 61, 70, 64 P.U.R.3d 433 (1966), aff’d sub nom. Midwestern Gas Transmission Co. v. FPC, 388 F.2d 444 (7th Cir. 1968). [↑](#footnote-ref-88)
88. *In re Long Island Lighting Co*., Case No. 27563, 71 PUR 4th 262 (N.Y. Pub. Serv. Comm’n,) (Nov. 16, 1985). [↑](#footnote-ref-89)
89. Stanton Testimony at 16. [↑](#footnote-ref-90)
90. *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 89 (March 31, 2016). [↑](#footnote-ref-91)
91. Staff Ex. 4, AEP Audit Report (Dec. 17, 2021). *See also,* AEP Motion for Protective Order, Audit Report at 51 (Jan. 4, 2024). [↑](#footnote-ref-92)
92. *Id.* [↑](#footnote-ref-93)
93. R.C. 4928.148(A). [↑](#footnote-ref-94)
94. R.C. 4928.01(A)(42). [↑](#footnote-ref-95)
95. Staff Ex. 4, AEP Audit Report (Dec. 17, 2021). *See also,* AEP Motion for Protective Order, Audit Report at 51 (Jan. 4, 2024). [↑](#footnote-ref-96)
96. *In the Matters of the Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement,* Order No. 08-487, [2008 Ore. PUC LEXIS 370, 269 P.U.R.4th 1, 200-201](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=42ee64d5-3e18-4d94-a21a-434f9f266aa6&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A4TNV-9X00-00T9-83JK-00000-00&pddocid=urn%3AcontentItem%3A4TNV-9X00-00T9-83JK-00000-00&pdcontentcomponentid=238448&pdteaserkey=h4&ecomp=y74k&earg=sr0&prid=fc849b88-8551-4cca-906e-7670ff9fa0ca)(Sept. 30, 2008). [↑](#footnote-ref-97)
97. R.C. 4928.148(A). [↑](#footnote-ref-98)
98. *Id.* [↑](#footnote-ref-99)
99. R.C. 4909.15(A)(4). [↑](#footnote-ref-100)
100. R.C. 4909.15(C)(1). [↑](#footnote-ref-101)
101. OCC Ex. 7, OVEC Annual Report 2020 at 11 (emphasis added). [↑](#footnote-ref-102)
102. *Id.* [↑](#footnote-ref-103)
103. Staff Ex. 6, Duke Audit Report at 12 (Dec. 17, 2021). [↑](#footnote-ref-104)
104. *Id.* at 13. [↑](#footnote-ref-105)
105. R.C. 4928.148(A). [↑](#footnote-ref-106)
106. *In the Matters of the Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement,* Order No. 08-487, [2008 Ore. PUC LEXIS 370, 269 P.U.R.4th 1, 200-201](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=42ee64d5-3e18-4d94-a21a-434f9f266aa6&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A4TNV-9X00-00T9-83JK-00000-00&pddocid=urn%3AcontentItem%3A4TNV-9X00-00T9-83JK-00000-00&pdcontentcomponentid=238448&pdteaserkey=h4&ecomp=y74k&earg=sr0&prid=fc849b88-8551-4cca-906e-7670ff9fa0ca)(Sept. 30, 2008). [↑](#footnote-ref-107)
107. OCC Ex. 7, OVEC Annual Report 2020 at 10-11. [↑](#footnote-ref-108)
108. *Id.* at 10. [↑](#footnote-ref-109)
109. *Id.* at 10-11 (emphasis added). [↑](#footnote-ref-110)
110. *In the Matter of the Commission’s Investigation into the Financial Impact of FASB Statement No. 106,* “Employers Accounting for Postretirement Benefits Other Than Pensions,”Case No. 92-1751-AU-COI, Finding and Order (Feb. 25, 1993). [↑](#footnote-ref-111)
111. *Id.* [↑](#footnote-ref-112)
112. OCC Ex. 7, OVEC Annual Report 2020 at 10-11. [↑](#footnote-ref-113)
113. The amounts collected by AEP, Duke and DP&L for postretirement benefit costs during 2020 can be determined from the monthly OVEC billing statements (OCC Ex. 12C) multiplied by their OVEC ownership share. [↑](#footnote-ref-114)
114. Staff Ex. 1, Audit Report at ¶¶ 27-34. [↑](#footnote-ref-115)
115. Staff Ex. 4, AEP Audit Report (Dec. 17, 2021); Staff Ex. 6, Duke Audit Report (Dec. 17, 2021); Staff Ex. 2, AES Ohio Audit Report (Dec. 17, 2021). [↑](#footnote-ref-116)
116. *Id.* [↑](#footnote-ref-117)
117. *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR, et al. Audit Report (Sept. 16, 2020). [↑](#footnote-ref-118)
118. *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR, Audit Report (Oct. 10, 2021). [↑](#footnote-ref-119)
119. Perez Testimony at Attachment JSP-3. [↑](#footnote-ref-120)
120. *Id.* [↑](#footnote-ref-121)
121. *Id.* [↑](#footnote-ref-122)
122. *Id.* [↑](#footnote-ref-123)
123. *Id.*; OCC Ex. 10. [↑](#footnote-ref-124)
124. Hearing Transcript Vol. II, pp. 187-209 (Nov. 15, 2023). [↑](#footnote-ref-125)
125. Perez Testimony at Attachment JSP-3. [↑](#footnote-ref-126)
126. Perez Testimony at 2-5. [↑](#footnote-ref-127)
127. *Id.*; Hearing Transcript Vol. V, pp. 1253-1255 (Nov. 17, 2023). [↑](#footnote-ref-128)
128. Hearing Transcript Vol. II, pp. 207-229 (Nov. 15, 2023). [↑](#footnote-ref-129)
129. Ohio R.Evid. 103(A). [↑](#footnote-ref-130)
130. Hearing Transcript Vol. II, pp. 202-203 (Nov. 15, 2023). [↑](#footnote-ref-131)
131. Ohio R.Evid 401. [↑](#footnote-ref-132)
132. *Colony by the Mall v. Duckro,* 2d Dist. Mont. No. CA 6169, 1979 Ohio App. LEXIS 8802 (June 29, 1979). [↑](#footnote-ref-133)
133. *State ex rel. Mohr v. Colerain Twp.,* 2022-Ohio-1109, 1st Dist.; *Shore v. Best Cuts, Inc.*, 8th Dist. Cuyahoga No. 77340, 2000 Ohio App. LEXIS 5553, 2000 WL 1754007 (Nov. 30, 2000); *Colony by the Mall v. Duckro,* 2d Dist. Mont. No. CA 6169, 1979 Ohio App. LEXIS 8802 (June 29, 1979). [↑](#footnote-ref-134)
134. Entry, Request for Proposals (May 5, 2021). [↑](#footnote-ref-135)
135. Ohio R.Evid. 402. [↑](#footnote-ref-136)
136. Ohio R.Evid. 403. [↑](#footnote-ref-137)
137. Entry, Request for Proposals (May 5, 2021). [↑](#footnote-ref-138)
138. *Oberlin v. Akron Gen. Med. Ctr.,* 91 Ohio St.3d 169, 2001-Ohio-248, 743 N.E.2d 890. [↑](#footnote-ref-139)
139. *Id.* [↑](#footnote-ref-140)