

In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018.)	Case No. 18-1004-EL-RDR
)	
In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019.)	Case No. 18-1759-EL-RDR
)	
In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.)	Case No. 20-167-EL-RDR
)	

**BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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March 17, 2021

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1004-EL-RDR
Company for 2018.)	

In the Matter of the Review of the Power)	
Purchase Agreement Rider of Ohio Power)	Case No. 18-1759-EL-RDR
Company for 2019.)	

In the Matter of the Review of the)	
Reconciliation Rider of Duke Energy Ohio,)	Case No. 20-167-EL-RDR
Inc.)	

**JOINT MOTION FOR A WAIVER OF OHIO ADMIN. CODE 4901-1-16(I) TO THE
EXTENT NECESSARY , TO ALLOW A CONSOLIDATED DEPOSITION OF PUCO
AUDITOR LONDON ECONOMICS IN THE AEP AND DUKE (OVEC) COAL POWER
PLANT CASES**

**BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") jointly file this motion to further customers' and the PUCO's interest in reviewing the coal plant costs that the PUCO required Ohioans to subsidize for no benefit. Indeed, AEP, DP&L and Duke send Ohioans' subsidy money to an Indiana coal plant and their coal plant sends back air pollution to Ohio.

A recent report drafted for OMAEG (on Ohio's subsidy culture related to coal power plants) includes estimates that OVEC-related subsidies have cost Ohioans \$159 million from

2017 through 2019 and could total an additional \$700 million by 2030.¹ OVEC is the Ohio Valley Electric Corporation.

In these cases about issues that predate the coal subsidy in House Bill 6 (“H.B. 6”) – which is inaptly named as the “Clean Air Bill” given the dirty power from OVEC – the PUCO’s auditor of the coal plant costs concluded that “some of the time, the PJM energy price did not cover fuel and variable cost.”² Although that is a too-polite way to put it, the auditor recommended that “OVEC reconsider its ‘must-run’ offer strategy.”³ The auditor’s polite words mean it should be considered whether AEP and Duke are acting in the best interests of their consumers to minimize the coal subsidy charges that the PUCO enabled. Interestingly, a similar issue involving coal-fired power plants recently has been addressed by MISO’s market monitor (Potomac Economics), in the region including Indiana. Potomac concluded that “Unfortunately, a small share of integrated utilities operate much less efficiently than others.”⁴

To the extent necessary and given that the deponent would be an outside auditor, not Staff, OCC and OMAEG move the PUCO for a waiver of the PUCO’s rule that prevents parties from taking the depositions of PUCO Staff. That waiver should allow for a consolidated deposition of PUCO auditor London Economics in these cases (if a waiver is even needed to depose an auditor). In the absence of consolidating the deposition, a deposition will need to be conducted separately in both the AEP and Duke cases.

¹ Runnerstone, LLC, *Ohio’s Costly – and Worsening – OVEC Situation* at 1 (Nov. 12, 2020), available at: <https://www.ohiomfg.com/wp-content/uploads/Ohios-Worsening-OVEC-Situation-11.9.2020-Final.pdf>.

² *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018* Case No. 18-1004-EL-RDR Audit Report at 9 (Sept. 16, 2020).

³ *Id.*

⁴ Potomac Economics, *A Review of the Commitment and Dispatch of Coal Generators in MISO* at 2 (Sept. 2020).

The PUCO has asserted that it will closely scrutinize OVEC's operations to ensure OVEC's practices are "in the best interest of retail [customers]." ⁵ The PUCO has also stated that when reviewing OVEC costs it will hold the utilities and OVEC to the following standard:

Retail cost recovery may be disallowed as a result of the annual prudency review if the output from the plants is not bid in a manner that is consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues. ⁶

PJM filed an amicus brief in that case. And the PUCO specifically adopted this standard of review in response to PJM's point that the PUCO must hold OVEC and the utilities to the same standard of what a competitive generator would do. PJM noted in its amicus brief that the PUCO would need to follow this standard to avoid undermining the competitive effectiveness of the PJM market:

[T]he PUCO Oversight Provision, more than any other in the Stipulation, has the greatest potential to impact the effectiveness of the wholesale market in Ohio for stimulating new investment. Moreover, since the Commission has stated that the PJM marketplace remains the primary vehicle it intends to utilize to attract and incent new generation resources, how this Commission implements this provision is critically important to whether those Ohio-specific goals can be achieved. ⁷

The electricity price from the two AEP/Duke/OVEC coal plants is much higher than the electricity obtained from competitive wholesale auctions. OVEC has been protected from losses and its anticompetitive strategies by the Ohio-approved subsidies charged to AEP's and Duke's customers. The PUCO approved a nonbypassable charge that is part of the AEP and Duke (and

⁵ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

⁶ *Id.*

⁷ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Brief for *Amicus Curiae* PJM Interconnection, L.L.C. at 4 (Feb. 1, 2016).

DP&L) standard offers. It's a special deal for the special interests of AEP, DP&L, Duke and the two uneconomic OVEC plants.

Indeed, on February 26, 2021, Fitch Ratings published an outlook on OVEC which included a projection that, from a consumer perspective, is dour: "Nonetheless, Fitch expects OVEC's all-in costs exceed prevailing merchant power prices and the plants to remain uneconomical for the foreseeable future."⁸

The PUCO hired independent auditors to review the coal plants' costs and the resulting bills by AEP Ohio, Duke and DP&L for charging customers. The most recent audit reports were prepared and filed by two different independent outside auditors (where the same auditor conducted the audits of AEP Ohio and Duke).⁹ Two of the audit reports (regarding AEP and Duke and their consumers) described a significant flaw with how the plants are run. These coal plants often were run for long periods when the cost to make electricity was greater than the revenues generated from the sales of the electricity.¹⁰ When OVEC runs the plants in this money-losing way, AEP, DP&L and Duke have been allowed to lean on consumers to subsidize the losses.

⁸ Fitch Ratings, *Fitch Affirms Ohio Valley Electric Corp. at 'BBB-'; Outlook Stable* (Feb. 26, 2021).

⁹ *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Audit Report (Oct. 21, 2020); *In the Matter of the Review of the Reconciliation Rider of The Dayton Power & Light Company*, Case No. 20-165-EL-RDR Audit Report (Oct. 27, 2020); *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR Audit Report (Sept. 16, 2020).

¹⁰ London Economics International LLC performed the Duke and AEP Ohio audits. Their reports appear to be more thorough in certain important respects than the audit of DP&L, which was performed by Vantage Energy Consulting, LLC. Both London reports noted that, at times, the variable operating cost of OVEC's electricity was greater than the price of electricity in the PJM day-ahead energy market. *In the Matter of the Review of the Reconciliation Rider of Duke Energy Ohio, Inc.*, Case No. 20-167-EL-RDR Audit Report at 53 (Oct. 21, 2020); *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR Audit Report at 52 (Sept. 16, 2020).

The OCC/OMAEG motion is more fully explained in the attached memorandum in support.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

OCC and OMAEG file this motion to give Ohioans the protection of the competitive market for lower electric bills (and hopefully for a cleaner planet) from outmoded, uneconomic and polluting coal plants that operate courtesy of Ohio's subsidy culture. Further, AEP, DP&L and Duke send Ohioans' subsidy money to an Indiana coal plant and their coal plant sends back air pollution to Ohio.

The prudent operation of power plants is important to consumers (and to the competitive market that can benefit consumers with lower prices and greater innovation). It's especially important when monopoly utilities (AEP and Duke) have an ownership share in two coal plants that allows them to tap monopoly customers to subsidize operating losses. Those losses occur as the coal plants continue their decades of polluting the planet, with the PUCO's support and with legislative support in H.B. 6.

The PUCO auditor recommended that “OVEC reconsider its ‘must-run’ offer strategy.”¹¹ The PUCO auditor’s words mean that there is at least the potential, if not the reality, that AEP and Duke are not acting in the best interests of their consumers. With regard to the utilities’ charges to consumers, the PUCO requires that the coal subsidy charges be minimized.¹²

A report was prepared recently for OMAEG, regarding the OVEC coal plants. It was estimated in the report that the coal subsidies for OVEC plants have cost Ohioans \$159 million from 2017 through 2019 and could total an additional \$700 million by 2030.¹³

Just recently Fitch Ratings published an outlook on OVEC which included a projection that, from a consumer perspective, is dour: “Nonetheless, Fitch expects OVEC's all-in costs exceed prevailing merchant power prices and the plants to remain uneconomical for the foreseeable future.”¹⁴

It’s too bad for consumers that utilities convinced the state to abandon the theme of R.C. 4928.38, which provided that the electric utility was to “be fully on its own in the competitive market” after the deregulation transition. But here we are in 2021 with utilities and the state making consumers subsidize corporate welfare for outmoded, uneconomic polluting coal power plants.

In these cases, it will be determined if the AEP/Duke/OVEC coal plants were imprudently managed and run, against the interests of consumers who were made to subsidize them. One of the issues involves whether PJM’s day-ahead energy prices and forward power

¹¹ *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR Audit Report at 9 (Sept. 16, 2020).

¹² *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

¹³ Runnerstone, LLC, *Ohio’s Costly – and Worsening – OVEC Situation* at 1 (Nov. 12, 2020), available at: <https://www.ohiomfg.com/wp-content/uploads/Ohios-Worsening-OVEC-Situation-11.9.2020-Final.pdf>.

¹⁴ Fitch Ratings, “*Fitch Affirms Ohio Valley Electric Corp. at ‘BBB-’; Outlook Stable*” (Feb. 26, 2021).

prices were used in making daily decisions on how to commit the coal plants (or were the plants deployed with inadequate regard for minimizing the subsidy cost to consumers).

Accordingly, the PUCO should grant this motion to investigate whether to disallow costs incurred when the variable operating costs for these coal plants exceeded the value of the electricity produced, among other case issues. The requested deposition will assist the PUCO to fulfill its stated intentions for consumer protection regarding these coal power plants.

II. LAW AND ARGUMENT

A. **The PUCO should grant OCC/OMAEG's request for a waiver (if needed) of the PUCO rule regarding PUCO Staff depositions, to allow a consolidated deposition of PUCO auditor London Economics in the AEP and Duke (OVEC) coal power plant cases.**

The PUCO ordered “that *any* conclusions, results, or recommendations formulated by the auditor may be examined by *any* participant to this proceeding.”¹⁵ The PUCO should uphold its order and allow the auditor to be fully deposed Although OCC/OMAEG do not concede that auditors are shielded by this rule, to the extent necessary, a waiver of Ohio Admin. Code 4901-1-16(I) is hereby requested.

The PUCO should note that Ohio Admin. Code 4901-1-38(B) allows for waivers of rules, including “upon a motion filed by a party...for good cause shown....” There is good cause for waiving Rule 16(I), if that is needed, and ordering the deposition of the auditor.

Depositions are a discovery tool used in PUCO proceedings where a witness provides information under oath that may be admissible in evidence.¹⁶ Many times parties use this tool to preview the examination of a witness who will present testimony at the hearing.

¹⁵ *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR Entry at ¶ 11 (Jan. 15, 2020) (Emphasis added).

¹⁶ Ohio Admin. Code 4901-1-21(N); Civ. R. 32.

London Economics, the auditor, noted that the coal plants operated for lengthy periods of time when the plants' variable operating costs exceeded the market price of the energy produced.¹⁷ The PUCO auditor also recommended:

Must-run offer strategy: LEI recommends that OVEC carefully consider when and whether the must-run offer strategy is optimal, as it appears that in some month, it may result in negative energy earnings for the plants. Weekly demand and price outlooks can be utilized, for example, to determine whether and how to offer generation during a given block of time, considering start-up costs and other factors.¹⁸

The auditor (London Economics) noted this flaw in the must-run offer strategy.

Again, it is important to note that the PUCO previously stated that a competitive standard is what it would follow in determining whether it would allow the utilities to charge consumers for the costs for these coal plants.¹⁹ The PUCO ordered “that *any* conclusions, results, or recommendations formulated by the auditor may be examined by *any* participant to this proceeding.”²⁰ The auditor should be made available promptly for a deposition.

Under R.C. 4903.082, parties must be given ample rights to discovery. The issue of whether the coal plants were committed in the same way a competitive generator would have committed the plants is a critical issue in the cases, per the PUCO's precedent. OCC and OMAEG need to depose the auditor on these points in order to have ample discovery to prepare for the hearing and provide evidence to the PUCO. Based on good cause under Rule 38(B) (if a rule waiver is needed), on the PUCO's prior ruling on examining the auditor's recommendations

¹⁷ PUCO Audit Report of AEP at 52.

¹⁸ PUCO Audit Report of AEP at 53.

¹⁹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

²⁰ *In the Matter of the Review of the Power Purchase Agreement Rider of Ohio Power Company for 2018*, Case No. 18-1004-EL-RDR Entry at ¶ 11 (Jan. 15, 2020) (Emphasis added).

and on R.C. 4903.082, the PUCO should grant OCC/OMAEG's motion to depose the auditor to allow us to obtain this important information.

III. CONCLUSION

OCC and OMAEG file this motion to give Ohioans the protection of the competitive market for their electric bills (and hopefully for a cleaner Ohio and cleaner planet) from outmoded, uneconomic, and polluting coal plants that operate courtesy of Ohio's subsidy culture. AEP/Duke/OVEC's management of the coal plants has allowed the plants to run for months at a time when their variable operating costs were greater than the prices they earned for selling the electricity. This situation is costing Ohioans dearly and should be deemed to be imprudent.

The PUCO should allow the consolidated deposition of the auditor. The deposition should be allowed toward determining, among other things, whether practices that include designating the OVEC units as "must-run" were in the best interest of customers and consistent with the best practices of competitive merchant companies.²¹

²¹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Mar. 31, 2016).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served on the persons stated below via electric transmission this 17th day of March 2021.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

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in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR, 20-0167-EL-RDR

Summary: Motion Joint Motion for a Waiver of Ohio Admin. Code 4901-1-16(I) to the Extent Necessary to Allow a Consolidated Deposition of PUCO Auditor London Economics in the AEP and Duke (OVEC) Coal Power Plant Cases by the Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Patricia J Mallarnee on behalf of John Finnigan