

**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 CONSOLIDATED HEARING
TO DETERMINE WHETHER AEP'S AND DUKE'S
OVEC CHARGES TO CUSTOMERS WERE PRUDENT
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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When the Public Utilities Commission of Ohio (“PUCO”) originally granted Ohio Power Company’s (“AEP”) request for its consumers to subsidize the Ohio Valley Electric Corporation (“OVEC”) coal plants, then-PUCO Chair Asim Haque wrote: “This should not be perceived as a blank check, and consumers should not be treated like a trust account.”¹ Unfortunately, however, the PUCO has allowed AEP, Duke Energy Ohio, Inc. (“Duke”) and The Dayton Power and Light Company (now “AES”) to charge consumers millions of dollars for the coal plants in Indiana and Ohio. It’s too bad that Chair Haque’s words have not been heeded – and extremely unfortunate for millions of Ohio consumers who have had to foot the bill. Tainted H.B. 6 has exacerbated the

¹ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement*, Case 14-1693-EL-RDR, Opinion and Order, Concurring Opinion of Chairman Haque at 5 (March 31, 2016).

problem, expanding the PUCO-approved coal plant subsidy and providing that “blank check” to AEP, Duke Energy and AES through 2030 at the projected added cost to Ohioans of \$700 million.²

This case is about consumers and the two old coal plants that the utilities would probably have closed long ago if shareholders had to pay for the plants’ losses. The utilities can keep running the plants because the PUCO requires consumers to subsidize them.

The PUCO hired independent auditors to review how the plants were operated and to determine the prudence of the utilities’ expenditures, and the audit reports suggest that the utilities were not acting like competitive operators because they ran the plants for long periods when the plants were losing money. In this deregulated state (Ohio), the PUCO should begin protecting consumers and treating the utilities as competitive operators of the OVEC plants by granting this motion and forcing AEP and Duke to carry the burden of proof to demonstrate that the OVEC costs that they are passing onto customers are just and reasonable.

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of the residential utility consumers of AEP and Duke, and the Ohio Manufacturers’ Association Energy Group (“OMAEG”) jointly request that the PUCO schedule the AEP and Duke cases for a consolidated evidentiary hearing where AEP and Duke will bear the burden of proof.³ And for an orderly process, given that the same auditor issued reports in both cases, OCC and OMAEG move the PUCO to consolidate for hearing the AEP and Duke audit cases.⁴ This approach will facilitate the “rigorous” review promised by the PUCO when it approved AEP’s rider (prior to the new, expanded OVEC rider created by H.B. 6).⁵ A hearing in these cases will allow for the

² Runnerstone, LLC, *Ohio’s costly – and worsening – OVEC situation* (Nov. 12, 2020).

³ O.A.C. 4901-1-27.

⁴ R.C. 4901.13; O.A.C. 4901-1-27(B)(7)(d).

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

presentation of expert testimony along with the opportunity for cross-examination. Issues will include whether AEP and Duke can prove that they acted prudently for consumers regarding how the OVEC plants were operated and how they were committed into the PJM Day-Ahead energy market, and whether the plants were operated in the best interest of customers and consistent with participation in a broader competitive marketplace.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

For the regulator (and consumers), the prudent operation of power plants is especially important when the utility has captive customers (here, Ohioans) that it is charging for operating losses through above-market subsidy charges. To that end, the PUCO should hold hearings, and consolidate the AEP and Duke-related hearings., as part of due process for achieving justice for consumers in its decision-making.

In enacting the Ohio 1999 deregulation law, the General Assembly intended to shift generation risk from consumers to the plant owners. But subsidies provided to utilities, including to AEP, Duke and AES for the OVEC coal plants, continue to unjustifiably harm consumers by shifting the utilities' risks to consumers.

The PUCO should adopt measures (such as cost disallowances) to protect consumers from bearing the risk of the utilities' management decisions. Those measures should include consumer protections from utilities' poor management decisions such as whether OVEC coal plant operations were imprudent. Accordingly, the PUCO's hearing should include whether the

utilities acted prudently (they didn't) by allowing the plants to operate when the fuel costs for the OVEC plants exceeded the value of the electricity the fuel produced.

The PUCO chose London Economics International, LLC ("London Economics" or "LEI") to audit the prudence and reasonableness of AEP's 2018 and 2019 charges to consumers under the power purchase agreement for the Indiana and Ohio OVEC coal plants. This same auditor was chosen to review Duke's 2019 OVEC coal plant charges to consumers. London Economics issued separate audit reports for AEP and Duke, but these audit reports substantially made the same finding:

Because the OVEC plants are offered into the PJM [Day-Ahead (DA)] market as 'must run,' there are times during which the PJM DA prices does not cover the variable cost of running the plants. LEI examined seven months chosen at random; on a monthly average basis, PJM prices were slightly lower than OVEC energy charges in February 2018, April 2019, August 2019, and December 2019 (see Figure 26). OVEC costs were significantly lower than PJM prices in January 2018; and somewhat lower in July 2018 and October 2018.⁶

This is a significant issue for consumers. The PUCO, in approving the creation of these riders (prior to H.B. 6), committed to closely scrutinize OVEC's operations. That scrutiny is to ensure OVEC's practices are "in the best interest of retail ratepayers" and to disallow charges to consumers "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."⁷ The AEP and Duke actions as detailed by LEI fail this standard.

⁶ Audit Report for AEP at 52.

⁷ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR (Opinion and Order at 89) (Mar. 31, 2016) (the "OVEC Order") (also stating, "AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers."). This March 31, 2016 Order related to AEP's PPA Rider, which, at the time, included more than just OVEC. The rider was subsequently modified to be for OVEC only. *See* Case No. 14-1693-EL-RDR (Second Entry on Rehearing) (Nov. 3, 2016). This modification does not impact the burden of proof in this audit proceeding.

In light of the Auditor’s significant findings, and consistent with the PUCO’s prior directive to have a “rigorous review,” the PUCO should hold a consolidated evidentiary hearing. That process will allow for parties to explore the auditor’s findings, including the issue of whether the utilities acted prudently and in the best interests of Ohio utility customers.

II. LAW AND RECOMMENDATIONS

- A. A hearing is required to fulfill the PUCO’s commitment to “rigorously review” the utilities’ OVEC charges and for the utilities to bear their burden of proving whether they operated the plants “in the best interest of retail customers” and “consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues.”**

When the PUCO approved the OVEC cost collection mechanism through the rate proceedings, parties raised concerns that the utilities might act unreasonably in bidding the plants into the PJM markets. The PUCO assured stakeholders that these matters would be subject to “rigorous review.”⁸ And the PUCO found that the utilities would be held to the same standard as a competitive merchant operator regarding how the plants are bid into the PJM market.⁹ The PUCO stated that this rigorous review process would include “periodic substantive review and audit.”¹⁰

When the PUCO initially approved AEP’s OVEC charge, the PUCO gave a detailed explanation of the rider review process.¹¹ The PUCO relied on *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.*¹² as authority for its power to review fuel charges.¹³ *Pike*

⁸ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Joint Stipulation and Recommendation at 7 (Dec. 14, 2015).

⁹ See footnote 7, *supra*.

¹⁰ *In re AEP ESP III*, Case No. 13-2385-EL-SSO Opinion and Order at 25 (Feb. 25, 2015).

¹¹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 87-90 (Dec. 14, 2015).

¹² 465 A.2d 735 (Pa. Cmwlth. 1982).

¹³ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 88 (Dec. 14, 2015).

County involved a hearing by the Pennsylvania Commission on a utility's fuel expenses.¹⁴

Regarding the OVEC rider review process, the PUCO explained that "AEP Ohio will bear the burden of proof in demonstrating the prudence of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers."¹⁵ As such, the only way the Commission can properly determine if AEP has sufficiently met its burden of proof is through an evidentiary hearing where both sides have the opportunity to present evidence.

Notably, AEP's brief in the initial OVEC rider case also relied on the *Pike County* case – again, where the commission held a hearing to review the reasonableness of the utility's fuel charges. AEP explained that the PUCO would exercise "substantial oversight over AEP Ohio's incurrence of PPA costs and revenues through the proposed PPA Rider audit process."¹⁶ AEP also explained that the PUCO's review of OVEC charges "will function much like the existing Fuel Adjustment Clause ('FAC') audits with which the Commission is extremely familiar."¹⁷

Whether FAC audits should include hearings was a hot topic in the 1970's. Most states did not hold hearings for FAC cases at that time. But then energy prices skyrocketed due to the Arab oil embargo and utilities were hit with higher nuclear fuel costs. Fuel prices almost doubled in one year, from 1973 to 1974.¹⁸ This fuel crisis led the National Regulatory Research Institute ("NRRI") to do a comprehensive study of the FAC process in every state, which concluded that, as a matter of best practice, state commissions should hold hearings in FAC cases:

¹⁴ *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm.*, 465 A.2d 735 (Pa. Cmwlth. 1982).

¹⁵ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 89 (Dec. 14, 2015).

¹⁶ *Id.* at 62.

¹⁷ *Id.* See also *Id.*, Testimony of William Allen in Support of Amended Application at 10 (May 15, 2015).

¹⁸ M. Leaffer, *Automatic Fuel Adjustment Clauses: Time for a Hearing* 30 Case W. Rsr. L. Rev. 228 (1980).

Subsequent to the audit, a formal fuel cost hearing before the commission should be required. The hearing would provide the formal proceedings for review of the operations of the utility under the adjustment clause. The findings of the commission staff review and the annual audit would provide the basis for evaluating the compliance of the utility with the adjustment clause and determining any settlement amount required and the reconciliation method to be employed.¹⁹

As part of this trend, Ohio enacted a law that provided for a hearing process that the PUCO could use for FAC cases.²⁰

With this background, AEP's reference to the FAC audit process in the 2015 case implied that a hearing would be held in the OVEC audit cases. Joint movants agree that a hearing in the OVEC audit cases was envisioned. And a hearing in the present case is absolutely necessary in order for the PUCO to conduct a "rigorous review" of the utilities' OVEC costs. Moreover, a hearing is necessary to allow parties to present evidence on whether the utilities operated the plants "in the best interest of retail ratepayers" and "consistent with participation in a broader competitive marketplace comprised of sellers attempting to maximize revenues."²¹ The audit reports suggest that the utilities fell short of this standard.

More specifically, the auditor's findings indicate that AEP and Duke acted unreasonably by allowing the plants to run continuously for long periods of time when the variable cost to produce electricity was greater than the market price of the electricity the plants produced. This resulted in significant charges to consumers at above-market prices. There is no indication that

¹⁹ K. Kelly, T. Pryor & N. Simons, Jr., *Electric Fuel Adjustment Clause Design*, Natl. Regulatory Research Inst. at 73 (1979).

²⁰ Am. Sub. H.B. 21, 113th G.A. (1979-1980).

²¹ *In re Ohio Power PPA Rider*, Case No. 14-1693-EL-RDR (Opinion and Order at 89) (Mar. 31, 2016) (the "OVEC Order") (also stating, "AEP Ohio will bear the burden of proof in demonstrating that bidding behavior is prudent and in the best interest of retail ratepayers."). This March 31, 2016 Order related to AEP's PPA Rider, which, at the time, included more than just OVEC. The rider was subsequently modified to be for OVEC only. *See* Case No. 14-1693-EL-RDR (Second Entry on Rehearing) (Nov. 3, 2016). This modification does not impact the burden of proof in this audit proceeding.

the plants were operated consistent with the standard that a competitive generator would have followed or in the best interest of retail customers. Indeed, it would have been in the best interest of retail customers to shut down the plants during these periods and the utilities could have supplied customers with electricity from the PJM Day-Ahead energy market at the market price. Under these circumstances, the commitment practices for the OVEC coal units were unreasonable. It would be unjust and unreasonable to allow the utilities' collection of monies from customers for such OVEC costs without first holding a hearing to determine whether the utilities acted in the best interest of retail customers and consistent with how a merchant operator would have run the plants. The utilities must bear the burden of proof to demonstrate that their actions were in fact prudent and in the best interest of customers.

B. When a utility seeks to collect fuel charges through a rider approved in an ESP, the PUCO's established precedent is to hold a hearing to review the reasonableness of the fuel charges. The PUCO should hold a hearing in the present cases, consistent with its established precedent.

FAC cases were eliminated when Ohio restructured its retail electricity market in 1999.²² FAC cases re-appeared in electric security plan cases beginning in 2008.²³ The first FAC case in the ESP era involved AEP. The primary issue was whether AEP should be allowed to collect \$66 million in delta revenue arising from a reasonable arrangement with Ormet, an aluminum manufacturer.²⁴ The PUCO denied requests for a hearing filed by Industrial Energy Users-Ohio ("IEU") and Ormet.²⁵ IEU appealed. The Supreme Court of Ohio denied IEU's appeal on

²² Am. Sub. H.B. 3, 123rd G.A. (1999-2000).

²³ See, e.g., *In re AEP ESP I*, Case No. 08-917-EL-SSO Opinion and Order (Mar. 18, 2009).

²⁴ *In the Matter of the Fuel Adjustment Charges for Columbus Southern Power Company and Ohio Power Company*, Case No. 2010-729, Merit Brief of Appellant Industrial Energy Users-Ohio at 15 (Ohio S.Ct.) (June 30, 2010).

²⁵ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-972-EL-FAC, Finding and Order at 5 (Jan. 7, 2010).

technical grounds because IEU failed to spell out its legal theory.²⁶ Nevertheless, the Court criticized the PUCO's process for implementing the rates: "Frankly, we find it questionable whether the law permits the commission to increase rates without first reviewing the reasonableness and lawfulness of the rates themselves."²⁷

After the Court criticized the PUCO's approach, the PUCO began holding hearings in ESP-related FAC cases. What followed was a long series of cases, including AEP's subsequent FAC cases²⁸ as well as Duke's FAC cases,²⁹ where the PUCO held hearings when the utilities sought to collect fuel charges through a rider approved in the utility's ESP cases. In the present cases, the PUCO is reviewing the prudence of the OVEC fuel costs that the utilities collected through a rider approved in their ESP cases. The PUCO's established precedent in such cases is to hold a hearing. There are no grounds for the PUCO to vary from its established precedent of holding a hearing in such cases.

²⁶ *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638 ¶14.

²⁷ *Id.* at ¶18.

²⁸ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-872-EL-FAC, Entry at 3 (June 29, 2010); *Id.*, Entry at 5 (Dec. 1, 2010). *Id.*, Entry at 3 (Aug. 18, 2011); *Id.*, Entry at ¶3 (Jan. 3, 2017); *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010*, Case No. 10-268-EL-FAC, Entry at 4 (June 16, 2011); *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-281-EL-FAC, Entry at 2 (Sept. 19, 2013). *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry at 3 (Aug. 29, 2016); *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 12-3133-EL-FAC, Entry at 3 (Aug. 29, 2016).

²⁹ *In the Matter of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2009*, Case No. 09-974-EL-FAC, Entry at 5 (June 14, 2010); *In the Matter of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2010*, Case No. 10-974-EL-FAC, Entry at 5 (June 1, 2011); *In the Matter of Duke Energy Ohio, Inc. to Establish its Fuel and Economy Purchased Power Component of its Market-Based Standard Service Offer for 2011*, Case No. 11-974-EL-FAC, Entry at 5 (June 12, 2012).

C. The PUCO should consolidate the AEP and Duke-related cases for hearing because the commonality of issues, evidence and witnesses would allow the PUCO to manage the cases in a more orderly manner.

O.A.C. 4901-1-27(B)(7)(d) allows the PUCO to assure that its hearings are “orderly.” Consolidating these particular cases for hearing would be orderly for all concerned. And consolidation should serve the achievement of justice. Also, R.C. 4901.13 allows the PUCO to adopt rules governing its proceedings.

The AEP and Duke cases are overlapping. The same or similar issues of the utilities’ OVEC ownership and plant operations will arise for consumers in both the AEP and Duke cases. The same burden of proof applies to each utility.

A central issue in each case is whether AEP and Duke, as part of OVEC, followed competitive practices in how they committed the plants into the PJM Day-Ahead energy market. The same auditor – London Economics – audited both of the utilities’ OVEC riders and issued audit reports and recommendations that were similar in many respects. The intervenors would likely present the same witnesses in each case. For the sake of orderliness, the PUCO should consolidate the cases for hearing.

III. CONCLUSION

Good utility practice suggests that the utilities buy their electricity for customers through competitive wholesale auctions. To the extent that the PUCO has allowed AEP and Duke to charge customers to operate and generate electricity from the OVEC plants at above-market prices, the PUCO should closely scrutinize the prudence of the utilities’ operations of OVEC.

The PUCO should hold a hearing. There it can develop a full record and apply a rigorous review to determine whether the utilities actions in bidding the coal plants power into the market was prudent, in the best interest of customers and consistent with the best practices of

competitive merchant companies when the variable cost to operate the plants and produce electricity was greater than the market price of the electricity the plants produced.³⁰

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³⁰ See footnote 2, *supra*.

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I hereby certify that a copy of this Motion was served on the persons stated below via electric transmission this 8th day of July 2021.

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Summary: Motion Joint Motion for a Consolidated Hearing to Determine Whether AEP's and Duke's OVEC Charges to Customers Were Prudent by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Patricia J Mallarnee on behalf of Finnigan, John